Supreme Court of the United States

OCTOBER TERM, 1961

No. 479

WONG SUN and JAMES WAH TOY,
PETITIONERS

vs.

UNITED STATES

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

INDEX

[fol. A] D. C. Form No. 100

IN UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA, SOUTHERN DIVISION

Title of Case

Criminal Docket 36819

Title 21 USC Sec. 174—Conspiracy to conceal and Transport Narcotics

THE UNITED STATES

vs.

WONG SUN, age 33, and
JAMES WAH TOY, age 23

Attorneys

For U.S.:

For Defendant: SOL A. ABRAMS—Both Defts.

DOCKET ENTRIES

JS-2 . . . .

Date		*Proceedings*
JS-5		Apr 29 1960 Both
1959		
Aug	5	1. Filed Indictment—issued bench warrant—Bail $1,000.00 2 Cts
	7	2. Filed appearance bond, as to TOY. (8/14/59)
		3. Filed appearance bond, as to SUN. (8/14/59)
		4-5. Filed 2 bench warrants, executed, as to TOY AND SUN.
	14	6. Filed appearance Sol A. Abrams for Both Defts.
	19	Both Defts arraigned—Ord con to Sept. 1st for pleas as to Both Defts LEG

Date		*Proceedings*
1959		
Aug 27		Ex Parte—Deft SUN and deft TOY both plead NOT GUILTY—Ord con to September 28 for trial. LEG
Sep 24		Ord con from Sept 28 to Sept 29 for trial. GBH
29		BOTH DEFTS signed Waiver of Trial by Jury—Ord con to October 15 for trial, as to Both Defts—on bail. GBH
	7-8.	Filed Waiver of Jury Trial, as to BOTH DEFTS.
Oct 15		Ord assigned to Judge Wollenberg for trial. GBH
[fol. B]		
Oct 15		*Court Trial begun*—evidence introduced—Ord objections on issue of probable cause made by counsel for Defts over ruled, Con to October 16 for further trial.
16		*Trial resumed*—evidence introduced—on the issue of the admittance of Pltf's Exhibits 1, 3, 4, Ord memos filed in 15-15 days—con to December 4 for further trial.
Dec 3		Ord con from December 4 to January 28 for further trial.
1960		
Jan 18		Ord con from January 28 to January 29 for further trial.
27		Ord con from January 29th to February 26th for further trial.
Feb 17	9.	Filed Reporter's Transcript.
26		Ord con to March 25th for further trial.
Mar 23	10.	Filed Gov't Memo in support of mo to admit exhibits.
	11.	Filed Deft's reply memo.
25		*Trial resumed*—evidence introduced—Ord mo by U. S. Atty for admittance of Gov'ts exhibits No. 1, 3 & 4 Granted—con to April-1st for Further Trial.

Date		*Proceedings*
1960		
Apr	1	Ord con to April 8th for further trial, as to Both Defts.
	8	Both Defts—Trial Resumed—Ord Deft's mo for Judgment of Acquittal GRANTED, as to count 1 and DENIED, as to count 2—BOTH DEFTS adjudged GUILTY on count 2—Referred to probation officer—con to April 29 for sentence.
	12.	Filed Plaintiff's answer to Deft's reply memorandum.
	29	Deft JAMES WAH TOY—Ord sentenced to 5 years. Deft WONG SUN—Ord sentenced to 10 years.
	13.	BOTH DEFTS—Filed Petition to appeal in Forma Pauperis.
	14.	Filed affidavit of deft WONG SUN, in support of Petition to appeal in Forma Pauperis.
	15.	Filed Affidavit of deft JAMES WAH TOY, in support of Petition to appeal in Forma Pauperis.
	16.	Filed Order Granting leave to appeal in Forma Pauperis, as to *Both Defts.*
	17.	Filed Order Directing the furnishing of Transcript of Proceedings to Defts and for payment to official reporters for preparation of Transcript on appeal in Forma Pauperis, as to *Both Defts.*
	18.	Filed Notice of Appeal, as to *Both Defts.*
	19.	Entered Judgment, as to Deft Wong Sun. (Filed April 29, 1960)
	20.	Entered Judgment, as to Deft James Wah Toy. (Filed April 29, 1960)
May	4	21. Filed Designation of Clerk's Transcript on appeal.
	16	22. Filed Commitment-executed, as to James Wah Toy. (Terminal Island, Calif)
	19	23. Deft WONG SUN—Filed Commitment—executed. (McNeil Island, Wash.)

[fol. C]

IN UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA, SOUTHERN DIVISION

Criminal No. 36819

Violation: Title 21 U.S.C., Section 174
(Conspiracy to Conceal and Transport Narcotics)

UNITED STATES OF AMERICA, PLAINTIFF

vs.

WONG SUN and JAMES WAH TOY, DEFENDANTS

INDICTMENT—Presented & Filed August 5, 1959

FIRST COUNT: (Title 21 U.S.C. Section 174)

The Grand Jury charges that:

At a time and place to the Grand Jury unknown WONG SUN and JAMES WAH TOY conspired with each other and JOHNNY YEE, the said JOHNNY YEE not being named as a defendant nor indicted herein, did fraudulently and knowingly conceal, transport and facilitate the concealment and transportation of a certain quantity of narcotic drug, to wit, heroin, knowing the same to have been imported into the United States contrary to law and to effect the objects of said conspiracy, the defendants WONG SUN and JAMES WAY TOY and co-conspirator JOHNNY YEE did the following overt acts in the State and Northern District of California:

Overt Acts

1. On or about June 3, 1959, the defendants WONG SUN and JAMES WAH TOY had a conversation upon the [fol. D] premises located at 606—11th Avenue in the City and County of San Francisco, State of California.

2. On or about June 1, 1959, the defendants WONG SUN and JAMES WAH TOY did transport heroin in the City and County of San Francisco, State of California.

3. On or about June 1, 1959, the defendants WONG SUN and JAMES WAH TOY delivered a package at 606 - 11th Avenue in the City and County of San Francisco, State of California.

SECOND COUNT: (Title 21 U.S.C. Section 174)

The Grand Jury further charges that:

On or about June 1, 1959, in the City and County of San Francisco, State and Northern District of California, the defendants WONG SUN and JAMES WAH TOY did fraudulently and knowingly conceal, transport and facilitate the transportation and concealment of a narcotic, to wit, heroin, then and there knowing the same to have been transported and brought into the United States, contrary to law.

A True Bill.

/s/ William W. Foshert Jr.
Foreman

/s/ Lynn J. Gillard
LYNN J. GILLARD
United States Attorney

(Approved as to form:

/s/ J. H. Riordan, Jr.

[fol. E] [File endorsement omitted]

Form No. 195

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SOUTHERN DIVISION

No. 36819

THE UNITED STATES OF AMERICA

vs.

WONG SUN and JAMES WAH TOY

INDICTMENT

Title 21, U.S.C., Section 174

(Conspiracy to Conceal and Transport Narcotics)

A true bill,

/s/ William W. Foshert Jr.
Foreman

• • • •

Bail, $1000.00 for each defendant.

/s/ Goodman, DJ

[fol. F] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

No. 36819

THE UNITED STATES OF AMERICA

vs.

JAMES WAH TOY

WAIVER OF JURY TRIAL—Filed September 29, 1959

In conformity with Rule 23 of the Rules of Criminal Procedure for the District Courts of the United States, effective March 21, 1946, we, the undersigned, do hereby waive trial by jury and request that the above entitled cause be tried before the Court sitting without a jury. DATED: San Francisco, California, Sept. 29, 1959.

/s/ James Wah Toy
Defendant

/s/ Sol A. Abrams
Attorney for Defendant

/s/ J. H. Riordan, Jr.
Assistant United States Attorney

APPROVED:

/s/ [signature illegible]
Judge, United States District Court,
Northern District of California

[fol. G] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

No. 36819

THE UNITED STATES OF AMERICA

vs.

WONG SUN

WAIVER OF JURY TRIAL—Filed September 30, 1959

In conformity with Rule 23 of the Rules of Criminal Procedure for the District Courts of the United States, effective March 21, 1946, we, the undersigned, do hereby waive trial by jury and request that the above entitled cause be tried before the Court sitting without a jury. DATED: San Francisco, California, Sept. 29, 1959.

/s/ Sun Wong
Defendant

/s/ Sol A. Abrams
Attorney for Defendant

/s/ J. H. Riordan, Jr.
Assistant United States Attorney

APPROVED:

/s/ [signature illegible]
Judge, United States District Court,
Northern District of California

[fol. H]

IN UNITED STATES DISTRICT COURT
FOR THE
NORTHERN DISTRICT OF CALIFORNIA
SOUTHERN DIVISION

[Title omitted]

* * * *

ARRAIGNMENT—August 19, 1959

This case came on regularly this day for arraignment. John H. Riordan, Jr., Esq., Assistant United States Attorney, was present on behalf of the United States. The defendants Wong Sun and James Wah Toy were present in proper person and with their attorney, Sol Abrams, Esq.

Defendants were called for arraignment. Each defendant was duly arraigned upon the Indictment filed herein against him, stated his true name to be as contained therein. The substance of the charge was stated to defendant and copy of Indictment handed to him. Defendant stated that he understood the charge against him. Mr. Abrams waived the reading of the Indictment.

After hearing counsel, ordered case continued to September 1, 1959, to plead.

* * * *

[fol. I]

IN UNITED STATES DISTRICT COURT
FOR THE
NORTHERN DISTRICT OF CALIFORNIA
SOUTHERN DIVISION

[Title omitted]

PLEAS OF NOT GUILTY—August 27, 1959

This case came on this day ex parte. John H. Riordan, Jr., Esq., Assistant United States Attorney, was present on behalf of the United States. Each defendant was present in proper person and with his attorney, Sol Abrams, Esq.

Defendants were called to plead and thereupon each defendant entered a plea of NOT GUILTY to the Indictment filed herein against him, which said pleas were ordered entered.

After hearing counsel, ordered case continued to September 28, 1959, for trial.

• • • •

[fol. J]

IN UNITED STATES DISTRICT COURT
FOR THE
NORTHERN DISTRICT OF CALIFORNIA
SOUTHERN DIVISION

[Title omitted]

MINUTE ENTRY OF TRIAL—October 15, 1959

This case came on regularly this day for trial and was assigned to Hon. Albert C. Wollenberg, District Judge, for trial before the Court. John H. Riordan, Jr., Esq., Assistant United States Attorney, was present on behalf of the United States. Sol Abrams, Esq., appeared for the defendants who were present on bond. James R. Hunt was sworn as interpreter for defendants. William J. Gowans, Johnny Yee, Robert C. Nickoloff, Alton B. Wong and William Wong were sworn and testified for the United States.

James Wah Toy was sworn and testified for the defendants on issue of probable cause only.

Objections on issue of probable cause made by counsel for defendants ordered overruled.

Plaintiff marked for identification Plaintiff's Exhibits 1 to 4 inclusive.

Motion made by plaintiff that Exhibits Nos. 1, 3 and 4 be admitted in evidence.

Thereupon, the hour of adjournment having arrived, the Court ordered that this case be continued to October 16, 1959, at 10:30 A.M. for further trial.

[fol. K]

IN UNITED STATES DISTRICT COURT
FOR THE
NORTHERN DISTRICT OF CALIFORNIA
SOUTHERN DIVISION

[Title omitted]

MINUTE ENTRY OF TRIAL—October 16, 1959

Further trial of this case was this day resumed.

Ruling reserved on motion of plaintiff to admit into evidence Plaintiff's Exhibits 1, 3 and 4.

Annie Leong and Sun Wong were sworn and testified for the defendants.

Robert C. Nicoloff and Alton Wong were recalled to the stand to testify further for the plaintiff, United States.

On issue of the admittance of Plaintiff's Exhibits 1, 3 and 4, ORDERED memos filed in 15 and 45 days.

ORDERED this case continued to December 4, 1959, for further trial.

• • • •

[fol. L]

IN UNITED STATES DISTRICT COURT
FOR THE
NORTHERN DISTRICT OF CALIFORNIA
SOUTHERN DIVISION

[Title omitted]

MINUTE ENTRY OF TRIAL—March 25, 1960

This case came on this day for further trial.

The defendants were present on bond and with Sol Abrams, Esq., their attorney. John H. Riordan, Jr., Esq., Assistant United States Attorney, was present on behalf of the United States.

The Government's motion to admit Government's Exhibits 1, 3 and 4 was ORDERED granted. Accordingly, Government's Exhibits Nos. 1, 3 and 4 were admitted and filed in evidence.

Thereupon the case was submitted.

IT IS ORDERED that this case be continued to April 1, 1960, at 10 a.m. for further trial.

• • • •

[fol. M]

IN UNITED STATES DISTRICT COURT
FOR THE
NORTHERN DISTRICT OF CALIFORNIA
SOUTHERN DIVISION

[Title omitted]

ORDER OF CONTINUANCE—April 1, 1960

This case came on this day for further trial.

The defendant James Wah Toy was not present. Wong Sun was present. Sol Abrams, Esq., appeared as attorney for defendants. John H. Riordan, Jr., Esq., Assistant United States Attorney, was present on behalf of the United States.

Upon stipulation of counsel, ORDERED that this case be continued to April 8, 1960.

• • • •

[fol. N]

IN UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SOUTHERN DIVISION

BEFORE: HON ALBERT C. WOLLENBERG, JUDGE

No. 36819,

UNITED STATES OF AMERICA, PLAINTIFF

vs.

WONG SUN and JAMES WAH TOY, DEFENDANTS

TRANSCRIPT OF EVIDENCE

APPEARANCES:

For the Government: LYNN J. GILLARD, ESQ., U. S. Attorney

By: JOHN RIORDAN, ESQ., Assistant U. S. Attorney

For the Defendants: SOL ABRAMS, ESQ.

PROCEEDINGS OF TRIAL

October 15, 1959 et seq

[fol. 2] THE CLERK: The United States of America vs. Wong Sun and James Wah Toy for trial.

MR. RIORDAN: The United States is ready, Your Honor.

THE CLERK: Counsel will please state their appearances for the record.

MR. RIORDAN: John H. Riordan, Jr., Assistant United States Attorney.

MR. ABRAMS: Sol Abrams, A-b-r-a-m-s, for the defendants.

THE CLERK: Thank you, counsel.

MR. RIORDAN: May it please the Court, at this time, there is an interpreter here. Mr. Abrams, do you need the services of an interpreter?

MR. ABRAMS: Well, so long as he is here, it might be advisable. One of the defendants is not too conversant in English, and he might need some help. The other one doesn't.

MR. RIORDAN: Would you step forward, sir?

THE CLERK: Would you please state your name for the reporter?

MR. HUNT: James R. Hunt.

(Thereupon, James R. Hunt was duly sworn to act as an official interpreter.)

MR. RIORDAN: If I may just make a brief short statement, Your Honor.

THE COURT: Yes, Mr. Riordan.

OPENING STATEMENT OF MR. RIORDAN

MR. RIORDAN: Your Honor sees from the filed, the [fol. 3] indictment is in two counts. The first count charges the two defendants with a conspiracy to violate the narcotics statute, to wit, the Jones-Miller Act, and that they did conceal, transport, and facilitate the concealment and transportation of narcotic drugs, to wit, heroin, and the three overt acts set forth therein. The second count is a substantive count charging them with concealment and transportation of the narcotic drugs. I believe, Your Honor, that the evidence will show that in the later hours of June 3rd of this year, or in the early morning of June 4th, narcotic agents received information that the defendant, James Wah Toy, had been and was dealing in narcotic drugs. They called upon Mr. Toy and told him that they had information that he was a dealer. Mr. Toy denied that he had any dealings in narcotic drugs, but that he knew where he could get some and told them where; that he had just obtained some, a small amount of narcotics a short time previously from the co-conspirator named in this indictment, but not as a defendant, one Johnny Yee.

With this information, the agents went to the home of Johnny Yee and there they found some narcotic drugs

concealed. They also received information, as the result of investigation, the the defendant James Wah Toy and the co-defendant Wong Sun were the suppliers or obtainers of narcotics which were concealed on the premises of the co-conspirator, Johnny Yee.

For the Court's information, the co-conspirator has been indicted in an independent indictment and has plead [fol. 4] guilty and is presently awaiting sentence.

THE COURT: Very well.

MR. RIORDAN: Call Mr. Gowans.

WILLIAM J. GOWANS,

called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. RIORDAN:

Q What is your occupation, Mr. Gowans?

A I am a chemist, employed by the United States Treasury Department.

Q MR. RIORDAN: Will counsel stipulate that he is an expert witness in narcotic cases?

MR. ABRAMS: Yes.

MR. RIORDAN: It is stipulated by and between counsel that the witness now on the stand, is an expert, and may testify as to the chemical analysis of narcotic drugs.

MR. ABRAMS: So stipulated.

MR. RIORDAN: Q I asked you to bring with you this morning an exhibit.

A Yes, sir.

Q Would you hand it to me please—or would you open the exhibit? You are handing me a small brown paper bag, and in there contained are two transparent—or how many? Two or three dubber contraceptives—three—or four?

[fol. 5] A Four.

Q And inside the rubber containers is a white powdery substance, is that correct?

A That is correct.

Q And you are handing me—

MR. ABRAMS: Are you going to have all the witnesses in the courtroom?

MR. RIORDAN: This will be the next witness.

MR. ABRAMS: Well, I see more than one in the courtroom.

MR. RIORDAN: What is your objection? Make it to the Court.

MR. ABRAMS: I will ask for an order excluding witnesses. If you want to permit—I will stipulate the agents may remain.

MR. RIORDAN: Mr. and Mrs. Yee, will you step just outside the door, please. I think that's all the witnesses.

THE COURT: We better send somebody over there, so they can sit down.

MR. RIORDAN: I think we will be through with this witness in a moment; don't you think so, Mr. Abrams?

MR. ABRAMS: Yes, this is nothing much.

MR. RIORDAN: I think it will be a matter of a few minutes, Your Honor.

Q Now, you are also handing me a small box about four inches in length and about one inch high and one [fol. 6] inch wide; is that correct?

A Yes, sir.

Q And therein contained are eight white paper bindles, is that correct?

A That is correct.

Q And the contents of each of the paper bindles is a white powdery substance, similar to the one contained in the brown bag we described, is that correct?

A That is correct.

Q Now, when were these items I have just described delivered to the office of the United States Chemist?

A They were delivered June 4, 1959.

Q I see. Would you mark that as Number 1 for identification, please; what was that date again?

A June 4, 1959.

THE CLERK: Plaintiff's Exhibit 1 marked for identification.

(Brown paper bag and box marked Plaintiff's Exhibit 1 for identification.)

MR. RIORDAN: Q By whom were they delivered to the office?

A Narcotics agent Nickoloff.

Q And has the exhibit been kept under the custody and contr l of the United States Chemist from that time until the present moment in Court?

[fol. 7] A Yes, it has.

Q Was a chemical analysis made of the contents of the rubber containers and the brown paper bag and the bindles; the powder in the bindles in the small box described?

A Yes, sir.

Q What did the chemical analysis indicate the substance to be?

A The analysis of the material in each one of the paper bindles and each one of the rubbers contained heroin.

Q And what was the total amount, Mr. Gowans?

A The total amount was 27 grams, 950 milligrams.

Q That's about an ounce, 28 grams to an ounce; isn't it?

A Approximately, yes, sir.

Q Was this approximately one gram short of an ounce of heroin; is that correct?

A Yes, sir.

MR RIORDAN: No further questions.

MR. ABRAMS: No questions, Your Honor.

(Witness excused.)

MR. RIORDAN: Call Mr. Yee.

JOHNNY YEE,

called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

[fol. 8] DIRECT EXAMINATION

BY MR. RIORDAN:

Q Would you state your name again, please.

A Johnny Yee.

Q Y-e-e, is that correct?

A Yes, sir.

Q Mr. Yee, do you know the defendant James Wah Toy?

A Yes.

Q Would you point him out to the Court, please?

A The one in the blue sport coat.

Q The one in the blue sport jacket; and do you know the defendant Wong Sun?

A Yes, sir, I know him slightly.

Q You know him slightly. Would you point him out to the Court, please?

A The one sitting next to him on the right.

Q The one sitting next to the defendant James Wah Toy?

A Yes, sir.

Q And how long have you known James Wah Toy?

A Since '51, or '52. I think it was '52.

Q And how long have you known the defendant Wong Sun?

A Just this year.

Q Just this year. Do you know him under the nickname, "Sea Dog"?

A Yes, I was introduced to him as "Sea Dog."

[fol. 9] Q He is a sailor, merchant marine? Isn't that what he is? Isn't that where he got his name?

A I don't know.

Q You don't know. It is just a nickname?

A Yes, sir.

Q Now, calling your attention to the evening of June 3rd of this year, did he—did either one of these defendants visit your home?

A No, sir.

Q They didn't visit your home?

A No.

Q You were arrested, were you not, on the morning of June 4th?

A Yes, sir.

Q Just prior thereto, did either one of these defendants, or both, visit your home?

A One did. That was a month before, a month before that.

Q A month before; you are pretty sure of that, or are you uncertain?

A I am pretty sure, because we had just moved in about a month or a month and a half and then two weeks later we held a house-warming party.

Q And they appeared at the house-warming party?

A He came with his wife and kids.

Q Do you recall giving a statement on the day that [fol. 10] you were arrested concerning their visit to your home?

A Yes, I did.

Q Do you recall stating—

MR. ABRAMS: Well, do you want me to read this?

MR. RIORDAN: Pardon me. I will wait, Mr. Abrams.

MR. ABRAMS: Thank you.

MR. RIORDAN: Q Mr. Yee, do you recall making a statement at the office of the Bureau of Narcotics, right after you were arrested, is that right?

A Yes.

Q And you made that statement under oath and signed it; is that right?

A Yes.

Q Now, I will show you here—would you read just these two paragraphs, right here; this one and the next one (indicating).

A Out loud?

Q No, just read it to yourself. You don't have to read it out loud. No, do you recall, Mr. Yee, that you stated at that time that both of these defendants came to your house on Monday, June 1st, is that correct?

MR. ABRAMS: Just a moment. Your Honor, I object to counsel attempting to impeach his own witness. He has called this witness his own witness, and I have read that statement; and apparently—it is obvious that Mr. Riordan is using this statement here in an effort to im- [fol. 11] peach the witness he has called here.

MR. RIORDAN: I am not impeaching him, Your Honor; I am asking now if he recalls another date upon which the two defendants appeared at his house. We are trying to refresh his recollection.

THE COURT: All right. I will allow it on that basis. The question is, does he recall the other date. He may answer yes or no.

MR. RIORDAN: Q Do you recall another date upon which the defendants visited your home?

A As I said before, the only one that comes up was James Toy and that was just once.

Q When was that?

A The month before I was arrested.

Q Do you remember any other time when he came up?

A No.

Q After reading this statement, does that refresh your recollection?

MR. ABRAMS: I still say, Your Honor, counsel now is attempting to impeach this witness, his own witness, by having the witness refresh himself by referring to some statement here allegedly made by the defendant previously. And, I want to make another observation, Your Honor. I understand counsel made the statement that this defendant is a defendant in another case, another charge, a narcotics charge, in which he has entered [fol. 12] a plea of guilty. He is named in this indictment here with these two defendants as a co-conspirator, but not a defendant. I don't know what the charge was in the other, that the defendant had pleaded guilty to, but it is either possession or transportation charge, presumably; I suppose possession charge of narcotics. I haven't examined the indictment under which the defendant entered his plea of guilty, but here in this case, here, he is charged as a co-conspirator with these two defendants.

THE COURT: It would be more proper to say he is named as a co-conspirator, there is no charge in that indictment against Mr. Yee.

MR. ABRAMS: He is named as a co-conspirator, but not named as a defendant—

THE COURT: Right.

MR. ABRAMS: —in this indictment, the first count of which charges all three of the two defendants and this witness with having entered into a conspiracy to violate the narcotics statute to conceal, transport and facilitate

the concealment of narcotics. The second count charges only the two defendants on trial with the transportation of narcotics. Now, I understand the defendant at some stage of this proceeding—and I presume at the beginning of it when he was arraigned before this Court—had counsel representing him, either of his own choosing or appointed by the Court. In view of that situation that [fol. 13] he is a defendant in that case, although having entered his plea of guilty, but in view of the charges here in this indictment and the nature of the matter, I would imagine that the Court should be advised of this situation and that the defendant should have—this witness should have the advice of his counsel appointed by the Court or counsel of his own choosing. I don't know who he is.

THE COURT: He is not charged here with any crime, any crime whatsoever, in this case, or in this indictment.

MR. ABRAMS: Reading this statement here, Your Honor, if this witness were to testify in accordance with the statement I have read here, he would incriminate himself in other criminal charges. Now, he would have the right under the constitution, certain rights under the constitution, whether or not he wants to avail himself of those rights, I don't know. I cannot speak for him, but I think he should be advised by the Court; and I think it is—

THE COURT: I take it from the manner in which the United States Attorney is proceeding that he realizes that he cannot begin to prosecute for a wrong based on any statement that this witness might make here.

MR. ABRAMS: Yes, he can, Your Honor.

THE COURT: Without advice?

MR. ABRAMS: He can be prosecuted.

THE COURT: Without advice?

[fol. 14] MR. ABRAMS: There is no immunity granted.

MR. RIORDAN: We can grant him immunity right now.

MR. ABRAMS: No, you cannot. The United States Attorney cannot. The cases so hold.

MR. RIORDAN: On the motion of the United States Attorney, the testimony of any witness for the produc-

tion of books, papers or other evidence from any witness in a case proceeding before any grand jury or court of the United States involving the violation of any narcotics section, immunity may be granted.

MR. ABRAMS: It has not.

MR. RIORDAN: I just granted it to him now.

MR. ABRAMS: That section 1406 of Title 18 sets out a procedure for doing that. As a matter of fact, this defendant, I understand, has already entered a plea of guilty. He hasn't been granted immunity.

THE COURT: That is in another case.

MR. RIORDAN: Future charges.

MR. ABRAMS: No immunity from prosecution of present or future charges. I think this witness should have the protection of the Court, advising him of his rights.

THE COURT: Have you advised him? Well, very good, sir, and you are correct; and your interest in this witness is commendable. So, Mr. Yee, your know, in testifying here that you are under oath to tell the truth [fol. 15] and so forth in this case, and you are doing this voluntarily, are you?

THE WITNESS: Yes.

THE COURT: Has anyone offered you any hope of immunity or reward or anything by virtue of your testifying here?

THE WITNESS: No, just that I didn't want to come, but I was subpoenaed to come.

THE COURT: You were subpoenaed to come. Well, now are you willing to go on and testify here, or do you prefer not to?

THE WITNESS: I have no representative.

THE COURT: Do you want to be represented? Have you talked to your lawyer? Have you got a lawyer?

THE WITNESS: No, the public defender.

THE COURT: He was appointed? Who was he?

MR. RIORDAN: Daniel Cass, Your Honor.

THE COURT: Daniel Cass; and he is—have you talked this over with him, your coming here to testify today?

THE WITNESS: Yes, I told him, but he said he was going to Martinez today, for trial, and if he wanted me—

I mean, for him to help me, he wanted some money, but I couldn't raise that money.

THE COURT: In connection with your coming here now, he told you that? Then, you haven't had any advice of anyone as to whether or not you should testify here this morning?

THE WITNESS: No.

[fol. 16] THE COURT: And you are here by virtue of subpoena alone?

THE WITNESS: Yes.

THE COURT: Well, do you want to proceed and testify?

THE WITNESS: It's all right with me.

THE COURT: What's that?

THE WITNESS: It's all right with me.

THE COURT: It's all right with you to go ahead and tell the story, is that it?

THE WITNESS: Uh-huh.

THE COURT: And you realize, do you, it may be that as a result of what you say here, that anything you say in this record could be used as far as you are concerned, against you; you understand that?

THE WITNESS: Yes.

THE COURT: You know, too, that you have entered your plea of guilty to a charge in this court, and that you are awaiting sentence on that charge?

THE WITNESS: Yes.

THE COURT: And all of that, nevertheless, you are perfectly agreeable to go ahead?

THE WITNESS: Yes.

THE COUR' I don t know what else you could say to him.

MR. ABRAMS: May I suggest, Your Honor, you [fol. 17] should supplement—not instructions, but your advice to the witness, supplement your remarks by indicating to this witness that he has a constitutional right under the Fifth Amendment to refuse to testify if he wishes to, or he can waive those rights.

THE COURT: All right, I will be glad to say that. You know that under the Fifth Amendment, Mr. Abranams now desires that I ask you, that you have a

right to refuse to testify in this matter if you wish? You realize that—

MR. ABRAMS: On the grounds—

THE COURT: Yes. On the grounds it might incriminate you.

THE WITNESS: They just told me I had to.

THE COURT: If you refuse, it must be upon the grounds that it would incriminate you to testify. You understand that you would be subject to prosecution, if such be the case. Now, under those circumstances, are you—you stated a minute ago when I explained you could be prosecuted, perhaps, that it was all right with you under the situation. Now, if it is not all right with you, you should tell us so.

THE WITNESS: I don't know what would happen, if I refused.

THE COURT: That I cannot say, except that if you refuse, you refuse.

MR. ABRAMS: May I be permitted to ask the witness one question along that line there, Your Honor.

[fol. 18] THE COURT: What is the question?

MR. ABRAMS: It just suggested itself during the witness' answer, now; and that's the only reason I ask it. Did I understand the witness to say he was told he had to testify and by whom?

THE COURT: Somebody told you, you had to testify?

THE WITNESS: I was subpoenaed.

THE COURT: He said right from the beginning he was here by virtue of the subpoena, and I think he—unless he can qualify as a person who would come under the Fifth Amendment—

MR. ABRAMS: Unless he chooses to exercise his right under the Constitution.

THE COURT: Correct. You understand that, do you; do you understand you can exercise your right to refuse to testify in this matter under the Constitution of the United States, or you can testify and waive those rights. Do you understand now?

THE WITNESS: What I don't understand is that if I refuse to testify, I would still be coming back and forth to this courtroom.

THE COURT: I don't know what you mean, "You would still be coming back and forth to this courtroom."

THE WITNESS: I'm going to have to come back and forth in two or three days; and if I come back then, I will have to come back in another two or three days.

[fol. 19] THE COURT: I don't know about that. I can't answer that. I don't understand that, or what it refers to.

THE WITNESS: If I refuse now, that isn't the end of it; it doesn't mean that I won't never have to take the stand again.

THE COURT: It doesn't mean that you could refuse under all circumstances and all cases. It is just a question now whether it is your desire to proceed or to refuse to testify. That's up to you, as to answering, without my indication to you what would happen one way or the other; because I don't know any more than you know what would happen.

THE WITNESS: I would rather testify now.

THE COURT: You would rather testify now. Any other suggestions?

MR. ABRAMS: Yes, I think he should have the advice of his own counsel, appointed by this Court, and he should have his advice. He hasn't, apparently. He said he had court-appointed counsel who refused to be here.

THE COURT: Well, this isn't the matter in which his counsel was appointed by the court. This has nothing whatsoever to do against the charge.

MR. ABRAMS: It is part and parcel of it.

THE COURT: I cannot object to counsel's conduct whatsoever. Counsel was appointed to a specific case.

MR. ABRAMS: It's part and parcel of it.

[fol. 20] THE COURT: This is a separate proceeding entirely, in which he is not charged with any violation of law whatsoever. They were not appointing counsel for him to determine anything else but what he should do in connection with the case under which he was charged himself, in which he entered a pleas of guilty, we are informed. I don't know as much about it as you.

MR. ABRAMS: That's all I know.

THE COURT: All right.

MR. RIORDAN: Shall I proceed, Your Honor?

THE COURT: Yes, he hasn't refused.

MR. RIORDAN: Q Now, Mr. Yee, do you recall the two defendants, James Wah Toy and Wong Sun, coming to your house on another occasion?

A Only once.

Q You don't recall, is that the answer to the question?

A I don't recall them—

THE COURT: He says they came only once.

THE WITNESS: Just one of them.

MR. RIORDAN: Q What was the date?

A It was a month before I was arrested.

Q You are sure of that date?

A Yes.

Q Calling your attention to the statement there, you said they visited you on June 3rd?

MR. ABRAMS: If the Court please, I object to counsel [fol. 21] impeaching this witness by means of anything in that statement, it is not in evidence.

MR. RIORDAN: I claim surprise, Your Honor. I am proceeding on a written statement handed to me, signed by the defendant.

THE COURT: Of course, this defendant didn't tell you anything; you haven't laid a foundation here for your surprise, have you?

I mean, let's have what your surprise is.

MR. RIORDAN: My surprise is, I am going on his written statement handed to me by the agents of the Bureau of Narcotics, a statement taken from this defendant.

THE COURT: All right, but you have never had communication with this defendant?

MR. RIORDAN: No, that's correct.

THE COURT: Well, in other words, it is your opinion you haven't a direct statement?

MR. RIORDAN: Pardon, sir?

THE COURT: I say, you haven't had the direct statement?

MR. RIORDAN: No, Your Honor, it was submitted to me.

THE COURT: I have another matter before me now.

We will recess for ten minutes and dispose of it. Would you step down for a few minutes, Mr. Yee.

(Short recess)

THE COURT: All right, let's proceed.

[fol. 22] MR. RIORDAN: If my memory serves me right, Your Honor, I think we were at the point where I claimed surprise; and I wanted to examine him on the statement, and Your Honor has some doubt about the showing, since I didn't interview the witness prior to the trial.

THE COURT: I don't know. I think perhaps you should make a showing that this was his statement, that's all.

MR. RIORDAN: I see.

THE COURT: That this information you have is his statement, and I think then it would be a proper showing; maybe put a—did he state that it is signed by him and so forth?

MR. RIORDAN: I haven't gone into that yet.

THE COURT: Very well, go ahead.

(Johnny Yee, previously sworn, resumed the stand.)

THE COURT: Ask him if that is his signature.

MR. RIORDAN: Q Referring to that statement in front of you, Mr. Yee, is that your statement, and is that your signature and initial thereon?

A Yes.

Q And that was made before Agent Robert Nickoloff of the Bureau of Narcotics?

A Yes.

Q And it was made at the office of the Bureau of Narcotics on June 9th, is that correct?

[fol. 23] A Yes.

Q And you swore to the truthfulness of that statement?

MR. ABRAMS: Well, now, if the Court please—

THE COURT: Does that show it is a sworn statement?

MR. RIORDAN: Yes, it is a sworn statement.

THE COURT: He said yes, it purports to be a sworn

statement, and you did say everything there was true and correct, did you?

THE WITNESS: I said it was true, sir, but a lot of it is lies.

THE COURT: But that is the statement you made?

THE WITNESS: Yes, sir.

THE COURT: All right, proceed.

MR. RIORDAN: Q Referring to the second from the last paragraph, didn't you state in that statement, that "on Monday, June 1, 1959, prior to midnight, both James Toy and Wong Sun came to my house," is that correct.

A I stated that, but I lied to that.

Q You lied to that?

A Yes.

Q I see. And then, in the bottom paragraph, didn't you say that "James again called me Wednesday evening, June 3rd, shortly before 11:00 p.m., and said he would be by; he and Wong Sun came up between 11:00 p.m. and midnight," is that correct?

[fol. 24] A I said that also; but that's also a lie.

Q Why did you lie at that time?

MR. ABRAMS: If the Court please, I object to that as argumentative; he is arguing with his own witness.

THE COURT: Yes, he has repudiated his statement.

MR. RIORDAN: No further questions, Your Honor.

MR. ABRAMS: No questions.

THE COURT: All right.

(Witness excused)

MR. RIORDAN: Agent Nickoloff.

ROBERT NICKOLOFF,

called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. RIORDAN:

Q Will you please state your name?

A Robert Nickoloff.

Q Mr. Nickoloff, what is your occupation?

A I am employed as a narcotics agent by the Federal Bureau of Narcotics.

Q Calling your attention to the date of June 3rd or June 4th, did you have an occasion to see the defendant, James Wah Toy?

A Yes, sir, I did.

Q When did you see him?

[fol. 25] A I saw him early in the morning of June 4th of this year, sir.

Q Approximately what time would that be, early in the morning?

A Approximately 6:30 in the morning.

Q Where did you see him?

A At his place of business and residence, Oyes Laundry, on Leavenworth Street. I forget the exact address; it's in the 1700 block.

Q Did you have any conversation with him at that time?

A Yes, sir, I did.

Q Who else was with you?

A Agent Casey.

Q Of the Bureau of Narcotics?

A Of the Bureau of Narcotics, yes, sir.

Q And James Wah Toy—was anybody else present when you spoke to him?

A No, no one else was present; no, sir.

Q Would you tell us what you said and what he said?

MR. ABRAMS: Now, if the Court please, I am going to object to the testimony of this witness as to any conversation had with the defendant James Wah Toy, on the grounds that obtaining such—having had such conversation and the circumstances under which the witness met and talked to the said defendant was all in violation of [fol. 26] the constitutional rights of the defendant; and in that regard, I'd like to have the opportunity of examining this witness on voir dire to ascertain the circumstances of his meeting with the defendant.

MR. RIORDAN: I wonder if we could have which particular right of the constitution—

THE COURT: Yes, I think that's right; tell us what your—

MR. ABRAMS: Well, under the provisions of the Fourth and Fifth Amendments of the Constitution. I think that's sufficient, to state that, Your Honor. Under the Fourth and Fifth Amendments of the Constitution.

MR. RIORDAN: What is the Fourth Amendment?

THE COURT: Yes.

MR. ABRAMS: I don't think I have to be—

THE COURT: I'd like to know what you are going to examine him about. I think, before I grant permission to examine on voir dire, I think I ought to know what the voir dire is aimed at, for what purpose.

MR. ABRAMS: That the conversation had between the witness and the defendant took place after the witness made illegal entry into the premises, the private premises of the defendant.

MR. RIORDAN: There is no evidence of that.

MR. ABRAMS: I have a right to do that.

THE COURT: All right, go ahead. Under the cir-
[fol. 27] cumstances, if that's what you are going to interrogate about.

MR. RIORDAN: May I respond to that, Your Honor? Illegal entrance in and of itself would be no basis of objection to this testimony at the present time.

MR. ABRAMS: It certainly would. The Government cannot avail itself of the illegal search and seizure—

MR. RIORDAN: Well, I will tell you right now, there was no illegal search and seizure.—

MR. ABRAMS: Well, I think we have the right. They were the private premises of the defendant.

THE COURT: Well, he testified it was a laundry. I take, you meant by laundry, place of business.

MR. ABRAMS: And home, Your Honor; a combination. I would like to represent to the Court at this time. We will show that was the defendant's business and home. He lived there.

THE COURT: My point is, he went in and had a conversation—

MR. ABRAMS: And made illegal entry into the premises, and then engaged the defendant in conversation that he is about to be asked about.

THE COURT: Well, if we can show that is illegal—

MR. ABRAMS: And the fruits of that illegal entry cannot be used by the Government in any way.

THE COURT: Well, you can examine in reference to [fol. 28] the entry that you are speaking about. Proceed.

MR. ABRAMS: May I just find my notes for a minute, Your Honor.

VOIR DIRE EXAMINATION

BY MR. ABRAMS:

Q Mr. Nickoloff, you are a federal narcotics agent?
A Yes, sir.
Q And you were such on June 3rd of 1959?
A Yes, sir, I was.
Q And for some considerable time prior thereto?
A That is correct, sir, yes.
Q And now, on June 3rd, in 1959, did you go to the premises at—just let me get the address so I can ask—did you go to the premises at 1733 Leavenworth Street?
A Not on June 3rd, sir, the morning of June 4th.
Q The morning of June 4th?
A Yes, sir.
Q You said about 6:30 a.m.?
A I believe that was about the time, yes, sir.
Q Who was with you at that time?
A Other federal narcotics agents and city policemen.
Q Federal narcotics agents and city police?
A Yes, sir.
Q How many in all?
A I don't recall the exact number. I would say there [fol. 29] were approximately six or seven of us, sir.
Q And will you state what the appearances of the premises was?
A Facing on Leavenworth Street, it is a laundry, approximately 25 to 30 feet wide. I would say the entrance or the face or it was. You enter to the rear of the laundry or living quarters.
Q Reached through the business?
A Through the business part.
Q The business part in the front?
A That is correct.

Q Now, the time that you went there, did you have a search warrant to search the premises?

A No, sir.

Q Did you have a warrant of arrest to arrest the defendant or anyone else?

A No, sir.

Q Had you secured either such search warrant or warrant of arrest?

A No, sir.

Q Was it dark at 6:30 in the morning?

A No, sir.

Q Were the premises—how did you enter, through the front business establishment?

A Through the business establishment, yes, sir.

[fol. 30] Q And was the door locked or unlocked?

A It was unlocked by Mr. Toy, sir.

Q Was it locked when you first came there?

A I don't—I was not the first person to the door; it was locked when the first person went to the door, yes.

Q Who was the first person to the door?

A Agent Alton Wong, sir.

Q Is he here in court?

A No, sir.

Q Was anyone alongside of Agent Wong when he went to the door?

A He went to the door by himself, sir.

Q And who was behind him?

A No one.

Q Who was the closest one to him?

A No one was immediately beside him at all, sir.

Q But you saw what he was doing?

A Yes, sir.

Q And what did Agent Wond do when he got to the door?

A He knocked at the door, sir.

Q And did anyone come to the door?

A Yes.

Q Who came to the door?

A Mr. Toy, sir.

Q The defendant Toy?

[fol. 31] A Yes, sir.

Q And then what occurred?

A Agent Wong entered the premises. After he did, the rest of the agents and police entered.

Q Entered the premises?

A Yes, sir.

Q And, just one moment—are you sure that—did you see the defendant open the door?

A I could not actually see him open the door, no, sir; not from where I was.

Q You wouldn't say that Agent Wong or one of the agents did not force the door open?

A No, he knocked on the door.

Q But, I mean you wouldn't say that one of the agents forced the door open?

A No.

Q You want to bear with me one moment, sir?

MR. RIORDAN: Now, just a moment, Your Honor; just one thing. In regard to proceeding, everything so far in a motion to suppress evidence pursuant to the rules, a motion should have been made before trial unless some showing is made to the trial judge why he was taken by surprise and something entered into the case after the trial date. Now, that's under the rules; some showing must be made.

THE COURT: This inquiring into a conversation. [fol. 32] This is not as to any real evidence taken or anything of the kind. Let's get going, now, with this, and get it finished with.

MR. ABRAMS: Q Did you overhear any of the conversation between agent Wong and the defendant when the defendant opened the door?

A No, sir.

Q You didn't hear the conversation?

A No, sir.

Q How far away were you?

A I was approximately half a block away, sir.

Q At the time that Wong—

A Went to the door?

Q You were about a half block away?

A Yes, sir.

Q And he was alone?

A That is correct.

MR. ABRAMS: I think under the circumstances, your Honor, I will withdraw this; and if I may, be permitted to put the defendant on the stand for a moment to show the entry—for the limited purpose of showing the entry of the officers at this point, inasmuch as the officer—the agent who was there, the first one to make the entry, is not available; at this time, I will put the defendant on the stand for that limited purpose.

THE COURT: Well, we are concerned with the ques- [fol. 33] tion of—this all took place in the laundry premises, did it, in the place of business, as you go in?

THE WITNESS: The conversation that I had with Mr. Toy took place in the bedroom of the residence.

THE COURT: I see.

MR. ABRAMS: The living quarters of this defendant.

THE WITNESS: Yes, sir.

MR. ABRAMS: You may step down just a moment. May I have the interpreter, too, Your Honor.

THE COURT: Certainly.

THE CLERK: Please take the witness stand and please state your name to the Court, sir.

THE WITNESS: James Wah Toy.

JAMES WAH TOY,

called as a witness in his own behalf, being first duly sworn, testified through the interpreter as follows:

DIRECT EXAMINATION

BY MR. ABRAMS:

Q You are James Wah—

THE COURT: Can't we shorten all this up? Do we have to have a corpus delecti of any kind here?

MR. ABRAMS: No, this isn't corpus delecti. I just want to show the entry of the officers.

THE COURT: Do we have to have it before we can get statements and so forth?

[fol. 34] MR. ABRAMS: If I can show illegal entry here, Your Honor, the Government cannot use the fruits of an illegal entry into the home of this man.

THE COURT: All right, go ahead and do it.

MR. ABRAMS: Q You are James Way Toy, one of the defendants in this case?

A Yes.

Q On June 3rd and 4th, 1959, did you operate a laundry and also live at 1733 Leavenworth Street?

A Yes, I lived there a long time.

Q And do you have a laundry business in the front part of the premises, and do you live in the rear of the premises?

A Yes.

Q And who do you live in the rear of the premises with?

A My wife, my kids and my godfather.

Q How many children?

A At that time, I had one; now there are two.

Q How many rooms did your residential portion of the premises consist of?

A Five rooms.

Q And what were the rooms, what did they consist of?

A Three bedrooms, a living room and a kitchen.

Q And were they completely furnished as such?

A Yes.

Q With beds and kitchen furniture?

[fol. 35] A Yes.

Q And now, on the early morning, about 6:30 in the morning of June 4th, of this year, did someone come to your front door of your business establishment?

A Yes.

Q Who was it?

A I don't know.

Q Did you recognize some of the agents in the court room? Do you recognize some of the federal narcotics agents in the courtroom today?

A Just Mr. Wong, here.

Q Did you later learn the names? All right, he has identified Agent Wong. Do you recognize Agent Nickoloff?

A No.

Q. Did you later learn these were federal narcotic agents that came to your place?

A After they came in the house, they told me.

Q That they were federal narcotics agents?

A Yes.

Q How did they come into your house?

A The Chinese rang the bell and I answered it, and he said he wanted his laundry. After I opened the door, and I told him I didn't open until 8:30 and for him to come back, and as I tried to close the door, he busted the door in and came in. The door is still broken. I haven't fixed it yet.

[fol. 36] Q And did anyone else come in with him?

A There were seven or eight people that followed him in. And they filled the whole room up and even told my wife not to open for business.

Q And where did they go?

A The Chinese man followed me and even stepped on my bed and stepped on my child who screamed.

Q Well, did all of these agents go into your living quarters?

A Yes.

Q And was your wife and family in your living quarters at the time?

A Yes.

MR. ABRAMS: That's all.

CROSS-EXAMINATION

BY MR. RIORDAN:

Q Mr. Toy, the first time you saw the Chinese narcotics agent was in the morning when he knocked on the door of the laundry, is that right?

A He rang the bell.

Q Oh, he rang the bell. Then, you opened the door?

A Yes.

Q And then the agent showed you a badge, didn't he?

A No, he just asked for the laundry.

Q And after he showed you a badge, he said you were [fol. 37] selling narcotics to one Hom Way?

MR. ABRAMS: Just a moment. I am going to object to any conversation between—object to that as calling for a conversation between an agent and the defendant after—

THE COURT: This has to do with the entry.

MR. RIORDAN: That's right, at the time.

THE COURT: This is outside, as I understand it.

MR. ABRAMS: Outside, all right. May I ask that the interpreter make that clear to the witness where this conversation had taken place?

MR. RIORDAN: He is answering in English.

THE COURT: Yes, he is answering in English, and as I understand it, he and the interpreter are discussing these things together.

MR. RIORDAN: And the answer to that last question was no, is that correct? In other words, he first thing the agent did was identify himself and state he had information you were selling narcotics to Hom Way?

A He asked me that inside my residence.

Q Inside. All right, now, then, did you try and shut the door of the laundry before the agent came into the house?

A After I told him that I am not open until 8:30, I closed the door—eight o'clock—I closed the door, and as I walked away from the door, he broke into the door.

Q I see. Now, when the agent broke into the door, [fol. 38] is it not a fact that you ran through the laundry into the living quarters of your house behind the laundry?

A No, I was walking toward my bed, to go back to bed.

Q Were you walking or were you running, Mr. Toy?

A I wasn't running. I was just taking big steps.

Q You weren't running, but you were taking big steps; I see. Now, did the agent shout at you, "You are under arrest."

A No.

Q Well, did the agent finally catch up with you and grab a hold of you?

A He pulled out his pistol and he caught up with me, and took a hold of my hand and took me out to the living room.

Q I see; when did you first see the pistol in the agent's hand?

A Right where he was approaching the door toward my bedroom.

THE COURT: Could we recess now?

MR. RIORDAN: Yes, Your Honor.

THE COURT: All right. Two o'clock.

MR. RIORDAN: This is taking a little longer than I thought. We will have to go on this afternoon, but I think we should finish today.

THE COURT: Take a look and see if we are right in these conversations.

MR. RIORDAN: That you are right, Your Honor?

[fol. 39] THE COURT: Yes.

MR. RIORDAN: I will check it, Your Honor.

THE COURT: We will be in recess.

THE CLERK: The court is in recess until two o'clock p.m.

(Thereupon, court was adjourned at 12:15 p.m., until 2:00 p.m., the same date.)

[fol. 40] AFTERNOON SESSION—

OCTOBER 15, 1959, 2:30 P.M.

THE CLERK: The United States of America vs. Wong Sun and James Wah Toy, for further trial.

Let the record show that James Wah Toy is on the witness stand.

(James Wah Toy resumed the stand.)

MR. RIORDAN: Q Now, Mr. Toy, as I understand it, there is no door separating the laundry premises, the business establishment from your living quarters; is that correct?

A Yes, there is a door, but there are two addresses in the store.

Q Well, there is no door on hinges that can be closed between the laundry establishment and the living quarters?

A There is a door with a lock inside of that door.

Q Well, on this particular morning—

MR. ABRAMS: Pardon me, before you go further, I don't want to interrupt, but I want to be fair. I have two prospective witnesses in the courtroom. Is it all right for them to be seated?

MR. RIORDAN: Let them stay in.

MR. ABRAMS: I just wanted you to know that they were there.

THE COURT: Where is this door with the lock that [fol. 41] he is talking about?

MR. RIORDAN: Q Where is the door with the lock?

A The doorway is at—on one corner of the store that goes in toward a hallway that leads to these other rooms in the back.

Q Is there any door between the store and the hallway?

A Yes.

Q Was it open or shut when the agent came in?

A Open.

MR. RIORDAN: No further questions.

MR. ABRAMS: I have another question. I meant to ask this question, but you had already started your examination.

May I use the blackboard, Your Honor?

THE COURT: Sure.

REDIRECT EXAMINATION

BY MR. ABRAMS:

Q Mr. Toy, on the blackboard here I have these lines, and this space indicating north and south and this representing the street, Leavenworth Street going north and south; and your store is on—your store, combination store and home or residence was on the west side of Leavenworth Street; was it not? That is, if you were going from Market, if you were going from Sutter Street over to Broadway in that direction, it would be on your left, would it not, on your left?

A Right.

[fol. 42] Q So that would be the west side. I suppose—

MR. ABRAMS: Would you care to stipulate?

MR. RIORDAN: So stipulated.

MR. ABRAMS: Q Now, there is a door about—the store portion of the premises is about what space—what space does that occupy, about how wide and how long; would it be about 15 feet by 20 feet, or something like that? Would that be about right, just the store itself? About 15 by 20, or something along that line, would that be about correct?

Well, a little bit wider than this jury box and about half as long; a little bit wider and about half as long, just the store itself?

A The laundry itself is about from here to the wall and from the corner of that wall to the end of the wall.

Q I don't know whether we can agree on distance. Would 20 by 20—is that all right?

MR. RIORDAN: Sure.

THE COURT: Is that material?

MR. ABRAMS: I want to show—yes.

Q Now, in the corner—this front portion is your business, the laundry and cleaning portion is your business; the laundry and cleaning business, is that right? I will put "B" there; and then at the back end of that portion is a door which leads to the hallway to the residence where you live with your family, is that right?

[fol. 43] A Yes.

Q That is at this point "X"; and there is a long hallway there. On each side of the hallway are doors leading to the rooms in your living quarters; is that right?

A Yes.

Q There is a bedroom here, right?

A Yes.

Q Bedroom here, right?

A Yes.

Q Another bedroom here, right?

A Yes.

Q All having doors out on the hallway?

A Yes.

Q And then at the—there is a bathroom here, right?

A Right.

Q And at the end here is a kitchen, a kitchen at the end?

A He said at the other side. There is a toilet here.

Q That's right, yes. That's right, there is a toilet and then the kitchen.

A Yes.

Q And alongside the kitchen at the end is the living room?

A Yes.

Q That about right?

A Yes.

[fol. 44] Q That about the way it is laid out?

A Uh huh.

Q All right, now, when the officers—when the agents came to your place on June 4th at 6:30 in the morning, you say the bell rang and you, at that time—where were you when the bell rang?

A I was sleeping in

Q Right where I have the stick?

A Yes.

Q In this bedroom? Who were you sleeping there with?

A My wife and kid.

Q Boy or girl?

A Boy.

Q And then, when the bell rang, did you go to the street door of your business?

A Yes.

Q And did you get there by going through this door which separates the hallway from the business section?

A That was locked. I opened it and went out through that door.

Q This door at your hallway that leads into your living quarters was locked?

A Yes.

Q And you opened that and went through the front door of the street?

[fol. 45] A Yes.

Q Was that door locked or unlocked?

A Locked.

Q And where was—where was the lock on the front street door—what part of the door?

A On the right-hand side of the door.

Q At about what part of the door, the top, the middle, or at the bottom?

A Just about the middle.

Q And was it a lock in the door?

A Yes.

Q And did you have to put a key into the lock to open the lock in the door?

A Uh huh.

Q And did the door have a handle on it?

A Yes, there is a doorknob on the outside and one of the—a lever opened on the inside.

Q Now, I show you this door of this courtroom, showing a lock in the center of the door with a knob and a lock cylinder; that's right, on the face of the door just above the knob, so that—was that the kind of lock you had on your door?

A Yes, that is on the outside of the door.

Q That was on the outside of the door?

A Yes.

[fol. 46] Q And then, on the inside of the door—

A That part is the inside of the door.

Q This was the inside of the door?

A Yes, on the outside is a press lever.

Q Did the outside of the door also have a cylinder for a key?

A Yes.

Q You can lock it from either the inside or the outside of the door?

A You cannot lock it on the inside—it has just the turn of the knob. You can only lock it from the outside.

Q Yes, with that locking device.

A Yes.

Q Was there any other locking device—was there any other locking device on your door?

MR. RIORDAN: Mr. Abrams, are you familiar with the premises?

MR. ABRAMS: Yes, I was there—

MR. RIORDAN: Well, I will stipulate to it. Just tell us what it is, and I will stipulate to it.

MR. ABRAMS: I was there at the noon hour, and I saw it.

THE COURT: Just make the statement. You don't have to ask the questions. You tell us what the door is.

MR. RIORDAN: Give us the description, and I will [fol. 47] stipulate.

MR. ABRAMS: The door has the conventional lock and knob and cylinder, similar to the courtroom door there, with a little finger-pressing device on either the inside or the outside instead of the knob, to—the knob was on one side and the press-finger lever on the other side; and on the inside of the door there was also a little latch that runs across the door.

THE COURT: Like a bolt?

MR. ABRAMS: Like a bolt, a barrel bolt, and an additional locking device, known as a barrel bolt, on the inside and also there was a—what is this little—

THE COURT: Hook.

MR. ABRAMS: —little hook, yes. There was a hook and eye, also—a hook and eye on the inside. Shall I ask him to stipulate?

MR. RIORDAN: I will stipulate that that was the condition of the premises on the morning of June 4th.

MR. ABRAMS: Yes.

MR. RIORDAN: Surely.

MR. ABRAMS: Q Now, on the morning of June 4th, before the agents came there at 6:30 in the morning, was that door in good condition? Were you able to lock it and unlock the door?

MR. RIORDAN: I will stipulate, if that is the case. [fol. 48] The record will so show I will stipulate to that.

MR. ABRAMS: And except for being an old door, the door was in good repair.

MR. RIORDAN: So stipulate.

MR. ABRAMS: Q Now, you say that—you testified this morning that you opened the door first and then told the agent you weren't open until 8:00 or 8:30, and then you closed the door: is that what you testified, you closed the door again?

A Yes, I closed the door.

Q When you closed it, did you lock the door; did the door lock, or what?

A Yes.

Q And then what happened, when you closed the door and it locked?

A I walked back toward the bedroom.

Q And then what happened; did someone come in?

A Just as I reached my bed, I heard a crash on the door.

Q And what happened then?

MR. RIORDAN: I don't see any rebuttal in this. He has already testified on voir dire and direct examination—

MR. ABRAMS: I wanted to ask a couple more questions, but I didn't want to interrupt.

MR. RIORDAN: All right, go ahead; I am sorry.

THE WITNESS: And that agent there came into the bedroom and got onto the bed over to my side of the bed. [fol. 49] MR. ABRAMS: Q You are referring, I suppose, especially, to Agent Wong?

MR. RIORDAN: Alton Wong.

THE WITNESS: Yes.

MR. ABRAMS: Q And is that the agent or gentleman who came to your door in the first place and asked for laundry, as you testified?

A Yes.

Q Now, let me ask you this. Did you examine your door, the front door leading to the street after—at any time after these men came in? You heard the crash; did you examine the door, the lock, to see the condition of the door?

A Yes, it couldn't lock any more.

Q What condition did you find the door and the lock in?

A The door was broken and the lock does not operate any more.

Q You are unable to use that central lock on your door; it will not lock the door any more?

A That's right.

Q How do you lock your door now?

A I have an outside lock and key.

Q Another one?

A Yes.

Q That is, put on after?

A Yes.

[fol. 50] Q And was the door itself broken and splintered around the lock?

A Yes, sir.

Q And was it necessary for you to put a screw in there to keep it together?

A Yes.

Q Now, you say the agent—you heard the crash, and then they came into your bedroom; is that right?

A Yes.

Q You had gone back to your bedroom, is that right?

A Yes.

Q And what did they do—what did any of the agents do then?

MR. RIORDAN: We have gone into that. He testified he stepped all over the bed, his children, his wife and everybody else.

MR. ABRAMS: No, we don't have this. We want to show the time the handcuffs were placed on the defendant. That's all I have to show.

THE COURT: All right, go ahead.

MR. ABRAMS: I will ask the direct question.

THE COURT: Yes, ask the direct question.

MR. ABRAMS: Q When the agents came into your bedroom, then did one of the agents put handcuffs on you immediately?

A Yes.

[fol. 51] Q And did they tell you you were under arrest?

A They didn't say a word to me, just handcuffed me.

Q Did one of them have a pistol in his hand?

MR. RIORDAN: That's been asked and answered, Your Honor.

MR. ABRAMS: He testified he did. All right.

Q And did—how many agents were there altogether? Stipulated about six agents and officers?

THE COURT: He testified seven or eight.

MR. ABRAMS: Seven or eight.

Q Did some of them search your place or room?

A Yes.

Q After you were handcuffed?

A Yes.

MR. ABRAMS: I think that covers it, Your Honor.

RECROSS-EXAMINATION

BY MR. RIORDAN:

Q Did they take anything from your house when they searched it?

A I don't know; but later when I went back, there were some papers and photographs missing.

Q I will repeat the question: Did they take anything from your house? I am not asking you what is missing.

A I don't know.

MR. RIORDAN: No further questions.

[fol. 52] THE COURT: All right, that's all.

COLLOQUY BETWEEN COURT AND COUNSEL

MR. ABRAMS: I have this defendant's wife here to testify, just as to the condition of the door before and after the entry of the agents. If counsel wants to stipulate to that, I will stipulate.

MR. RIORDAN: I will stipulate they may have done some injury to the door, your Honor.

MR. ABRAMS: May it be stipulated that I have her available to testify, and if she were to testify, she would so testify?

THE COURT: Agreed?

MR. RIORDAN: Yes, I will stipulate, Your Honor.

MR. ABRAMS: Her name is—

MR. RIORDAN: Mrs. Toy?

MR. ABRAMS: Mrs. Marie Toy, the wife of the defendant, Toy, would testify that the door and the lock were damaged by reason of these gentlemen.

THE COURT: Mr. Riordan said he would so stipulate.

MR. ABRAMS: So stipulated.

MR. RIORDAN: At this time, Your Honor, if I may—to try and shorten it up—and the reason I am asking this is, I have put two agents on to meet the statements of illegal entry and what-not; but there is no evidence that we have taken any object or any fruits of any crime in this particular instance. This is only argument.

[fol. 53] THE COURT: That's right.

MR. RIORDAN: What is the statement that he made, the agent, then, upon entering, asked the defendant Toy: "We understand you have been selling narcotics to one Hom Way, an informer and a former defendant in this court," and his answer was, "No, I don't deal in narcotics; I had nothing to do with it"; but he says, "I saw some last night." The agent asked him, "Where did you see it." That's the conversation that we started on, where did you see it, and the defendant on trial says, "At Johnny Yee's house located out in the Richmond District, way out in the avenues, several miles away from us."

So, with that information, the agents placed him under arrest, and went out and found the exhibits for identification, here in evidence. Now, the statement made by the defendant is not one of incrimination; the statement was one of denial of any participation in any crime. It is the same—let's drop the narcotics argument for a moment; let's look at it this way. I researched it for an hour and I couldn't find a case where search and seizure rule applies only to objects or the fruits of the crime. I could find the fruits of the crime, but nothing—none with the statement—

THE COURT: I have read them.

MR. RIORDAN: Now, Your Honor, supposing—no type of entry—any entry made by trespass in a murder case, [fol. 54] and they accused the person residing in the house of murder of so and so, and where is the gun that committed the murder? "Well, I didn't commit the murder, I had nothing to do with it, but the gun that you somewhat describe to me is in Mr. Smith's house in the Richmond district." Now, that's not—no evidence so obtained would be considered the fruits of the crime, or in any way connected with it; so the agents, acting on that, go out to Mr. Smith's house in another neighborhood and find the gun. Now, I think that's admissible evidence. Later on, after investigation, they found that the person to whom they originally entered—say by ballistics tests, handwriting, or other evidence and things like that—found it to connect up with this particular defendant—.

THE COURT: All right, if you have other evidence to connect all this up. I ask you what you had, whether it was just this statement. I asked—perhaps Mr. Abrams, if he was going to be interested in showing that there was some connection—

MR. RIORDAN: This statement is not necessarily the corpus of the crime. I am leading up to the over-all conspiracy.

MR. ABRAMS: Let me point something out to you, Your Honor. It will be shown, and I think Mr. Riordan must admit, that everything that they can produce in the way of evidence in this case—if they have any evidence to produce—stems from, originates from this illegal entry. It is the fruits of this illegal entry into defendant Toy's [fol. 55] place, and the courts have held—United States vs. Jeffers; United States vs. Kempe; People vs. Wilson; People vs. Sullivan—that evidence to be excluded as a result of an illegal entry includes not only physical evidence that is found and seized, but anything that stems from or aids or assists the officers at all in their further investigation or work. It includes admissions made by the persons, any discussions or testimony or any statements made or any discussion between the officers and the defendant; or any admission or confessions made.

THE COURT: That's right.

MR. ABRAMS: It provides that the officers cannot—the State and the prosecution cannot use any evidence, the knowledge of which—the very knowledge of which has its origin in the invasion of the defendant's constitutional right; and here, it has its origin right here in the invasion. They went. Now, about going out to that other house, or finding the narcotic there, if they hadn't gone in and made illegal entry into Toy's place and talked to him and ascertained these facts from him, they wouldn't have known about it. I think the cases are very clear on that subject, Your Honor. Those few cases I have cited, Your Honor—

THE COURT: Well, I think generally speaking, that is the rule, the statement itself coming out of the illegal entry; that's all you are offering now is the statement itself. You are offering it as part of the admission, at least.

[fol. 56] MR. RIORDAN: All right, Your Honor; we will prepare to proceed on that same question. Mr. Wong, would you take the stand?

ALTON WONG,

called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. RIORDAN:

Q Mr. Wong, calling your attention to the early morning of June 4, 1959, did you have occasion to go to the door of the premises located at 1733 Leavenworth Street?

A Yes, sir.

Q And what time was it when you approached the entrance?

A Oh, approximately about 6:30.

Q And upon approaching the entrance, what is the first thing you did?

A I rang the doorbell, and knocked on the door.

Q And what type of premises are those?

A That's a dry cleaning place.

Q Upon ringing the door, was there a response to the ring?

A At first there wasn't, and then I knocked on the door and then the defendant came out.

Q Which defendant?

A Mr. Toy, over there.

Q Mr. Toy; I see. He came out, and what did he do? [fol. 57] A Well, I told him that I wanted some laundry and dry cleaning things, and he told me, "I don't open until eight o'clock." He told me to come back then. And at that time, he got the door halfway open; and I pulled my badge out.

Q Describe what you mean by halfway open.

A He got the door—one hand on the door. The door is open about—I would say about 30 degrees open—and he was talking to me through the door, and he told me to come back at eight o'clock. I told him—I pulled my badge out, and told him, "I am a federal narcotics

agent." And at that time, he slammed the door and started running.

Q Running where?

A Running inside his living quarters.

Q Could you see him run?

A Yes, sir.

Q What is it, a glass door?

A Yes, it is a glass door.

Q No obstruction, is that correct?

A No, sir.

Q Then what did you do?

A I eased myself through the door and the door opened, and I ran after him. He kept running and I told him, I said, "I am a narcotics Treasury agent; and he ran over to his wife—his wife was sleeping in bed with the baby—and he ran over her; and at time—

[fol. 58] Q You mean you ran over the top of the bed?

A Over the top of the bed, sir.

Q He went over the bed first?

A Right.

Q With his feet, is that right?

A Right.

Q Then what did you do?

A I followed him there; and at that time he pulled a night stand drawer—he pulled it open and reached in for something in there. I don't know, I thought it was a gun at that time. I ran across and grabbed him. I pulled my gun, and told him to "Just stay where you are; you are under arrest," and I easily pulled his hand out of the drawer. There was nothing in there.

Q Then he was handcuffed?

A Then he was handcuffed.

MR. RIORDAN: No further questions.

CROSS-EXAMINATION

BY MR. ABRAMS:

Q I don't think I require any, but one or two.

When the defendant closed the door, it locked again, did it not?

A I tried to open it; it just opened, and I just pushed myself through the door and it was open.

Q Do you recall breaking the lock or breaking the door [fol. 59] in any way?

A I did not break the door, sir.

Q You don't recall doing that?

A I was only using the force necessary to open the door.

Q But you did use force, didn't you?

A I did, yes, sir.

Q You forced the door open and chased the defendant through his store, the store portion of the premises, through the door separating the store premises from the hallway to his living quarters?

A The door wasn't locked, sir.

Q That door was open?

A That door was open.

Q The door leading into the hallway into his living quarters was open?

A Right.

Q You chased him down the hallway into his bedroom?

A Yes, sir.

Q Put handcuffs on him and placed him under arrest, is that right?

A Not until he put his hand into the night stand drawer.

Q Then you put the handcuffs on him and placed him under arrest, and had drawn your pistol just before that; is that right?

A I had drawn a pistol because he reached into the [fol. 60] drawer. I didn't know what he had in it.

MR. ABRAMS: That's all.

MR. RIORDAN: No further questions.

(Witness excused.)

MR. RIORDAN: Call Mr. William Wong.

WILLIAM WONG,

called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. RIORDAN:

Q What is your occupation, Mr. Wong?

A Narcotics agent, United States Treasury Department.

Q Calling your attention to the early morning of June 4th, did you receive any information from an informer that the defendant Toy was dealing in narcotics?

A Yes, sir, I did.

MR. ABRAMS: Just a moment. I take it you are offering this in rebuttal to the offer of the defendant? This goes to the question of illegal entry or illegal—

MR. RIORDAN: I am showing probable cause why he arrived at the time.

Q You did receive information?

A Yes, sir.

Q Now, approximately what time did you receive this information?

[fol. 61] A Somewhere between 5:30 a.m. and six o'clock.

Q Was that a reliable informer?

A I believe so, yes, sir.

MR. ABRAMS: That's a leading question, but I won't object to it.

THE WITNESS: I would say he is reliable enough.

MR. RIORDAN: Q What information did you receive?

A I received information that he had purchased a quantity of narcotics, approximately one ounce of heroin the night before, or the day before, from a person known to him as "Blackie Toy," in a laundry on Leavenworth Street.

Q So with this information, you went to the premises there; is that correct?

A That is correct.

MR. RIORDAN: No further questions.

CROSS-EXAMINATION

BY MR. ABRAMS:

Q Did you have a search warrant or a warrant of arrest?

MR. RIORDAN: It is stipulated we did not.

THE WITNESS: We did not.

MR. ABRAMS: None was procured, right? So stipulated?

MR. RIORDAN: So stipulated.

MR. ABRAMS: Q You say you had information—you obtained some information about 5:30 the same morning, June 4th?

[fol. 62] A Yes, sir; that's correct.

Q About an hour before you went to the premises?

A Yes, sir.

Q And Mr. Riordan asked you if you received the information from reliable informants, and you said you thought so; is that right?

A I believe he would be reliable.

Q And the information you received was that that particular informant had purchased an ounce of heroin the night before from a person known as "Blackie Toy," is that it?

A Yes, sir.

Q At these premises, 1733 Leavenworth Street?

A He didn't give me the exact address. He said it was from "Blackie Toy" who operated a laundry on Leavenworth Street.

Q Now, will you state the name of the informant?

A Hom Way.

Q Had Hom Way been arrested shortly—or at any time approximately near this hour of 5:30?

A Yes, sir.

Q On this date?

A Yes, sir.

Q When was he arrested?

A I don't recall the exact hour, sir.

Q Just approximately; was it the same day?

[fol. 63] A I'd say approximately two o'clock that morning.

Q This Hom Way, he is a Chinese, by the way?
A That is correct.
Q Was he arrested by a federal narcotics agent?
A Yes, sir; he was.
Q For an alleged narcotic violation?
A That is correct.
Q Was he arrested on the charge of possession or sale of narcotics?
A Yes, sir; he was.
MR. RIORDAN: I think that is irrelevant, immaterial and incompetent.
MR. ABRAMS: It goes to the reliability of the informant. The cases hold we are entitled to—
THE COURT: That's all right.
MR. ABRAMS: Q And at the time that Hom Way was arrested, was he in possession of narcotics?
A Yes, sir; he was.
Q Approximately one ounce of narcotics?
A Not at the time of arrest; no, sir.
Q And had Hom Way, to your knowledge, previously to that time, been arrested or convicted for a narcotics violation?
A Not to my knowledge. I don't know.
Q How long had you known Hom Way?
A I had known him about six weeks.
[fol. 64] Q And had he ever given you any information before, as to narcotics traffickers and violations or traffickers and dealers in narcotics by other persons?
A No, sir.
Q This is the first time that Hom Way had given you any such information?
A Yes, sir.
Q And he gave you that information shortly after he was arrested on that same—within a few hours of 5:30 that morning?
A Yes, sir.
Q I take it, that information was given to you at your office, the narcotics office?
A That is correct, sir.
Q In the Federal State Building—Federal Building?
A Yes, sir.

Q And at that time was Hom Way still under arrest?
A Yes, sir, he was.
MR. ABRAMS: I think that's all.
MR. RIORDAN: No further questions.
I will submit it to your Honor.

COLLOQUY BETWEEN COURT AND COUNSEL

MR. ABRAMS: Probable cause, the entry; legality of the entry.
THE COURT: You mean objection to the question.
MR. RIORDAN: The objection to the question about [fol. 65] what was the conversation when this agent came in—right afterwards.
MR. ABRAMS: I think I can present any number of cases to Your Honor which are authorities for the point which—that that still doesn't constitute legal entry into the premises or give the officers legal or probable cause to make entry; and furthermore, it is into the private home or living quarters of the defendant, and a search warrant is required. The cases uniformly hold so.
MR. RIORDAN: How can you get a search warrant at five o'clock in the morning?
MR. ABRAMS: They hold it, the Scott case, the MacDonald case; any number of cases I can give you, Your Honor. I can give them to you right now.
THE COURT: Well, there are cases in which—the case in which they have reliable information and go to the purposes started, as I understand it, from agent Walton Wong—he showed his credentials at the door before it was slammed, and said, "You are under arrest," and he was out in the street. He had a perfect right to ring a man's doorbell, and he slammed the door and ran.
MR. ABRAMS: That doesn't justify their entry.
MR. RIORDAN: Gives greater cause.
MR. ABRAMS: Doesn't justify their entry into this private living quarters or his place of business, private [fol. 66] premises. He is certainly under the protection of the Fourth and Fifth—Fifth Amendment of the Constitution.
THE COURT: What authorities have we got?

MR. RIORDAN: I don't have any here with me, Your Honor. It is a question of fact.

THE COURT: That's right.

MR. RIORDAN: Either there is probable cause, or there isn't. Now, trying to make, from my point of view, a fair summary of the evidence, I believe it is this: That about five o'clock in the morning, they received information that this defendant here, Toy, is dealing in narcotics. Now, what is a reasonable conduct? Well, let's look at it. They have arrested one man for violation of the narcotics law, so they go and check out the information—which any officer of the law is entitled to do—and how did they do it? They rang the doorbell, and the defendant comes to the door; and it is not dark now, it is light at that time of the morning in June, the first part of June, 6:30 in the morning; and there is no reason to show that the defendant is in any particular fear, he opens the door, and the agent says, shows him a badge, and says, "I am a federal narcotics agent; you are under arrest for violation of the narcotics laws." And with that, the defendant slammed the door in his face, but does not walk away—even by his own admission. If it is a question of speed, if it is a question of how he gets [fol. 67] to the bedroom, well we will use the defendant's testimony—by long steps; or, as the agent has testified, he ran. There is only one thing for the agent to do. He shouts again, "You are under arrest," and forced open the door; then he chased him, first through a public office building, and then he was in hot pursuit to the bedroom. Now, leaving the front door of the premises and running, that was not the agents will and desire to go flying into private quarters, but it was the conduct of the defendant that led the agent right behind him into the private quarters. Now, as far as getting a search warrant, which was impossible at that particular time of the morning, the time they learned the information at five o'clock until the time he was arrested at 6:30 in the morning, there was no opportunity to get a judge or a commissioner to issue a warrant.

I think they acted—the additional—from the first information which would lead to the inquiry, to the defend-

ant's subsequent conduct when notified of the purpose of the agent, was at that time probable cause for a reasonable man, a narcotics agent, to make the entry the way he did; and from every second after that, it just led to greater and greater probable cause. Now, what type of man—if he is innocent—would go flying across, walking across the bed with a child and his wife—

THE COURT: Well, this applies whether he is innocent or guilty—

[fol. 68] MR. RIORDAN: No, it doesn't apply to his innocence or guilt; it applies only to the question of probable cause. Does the agent, under those circumstances—

THE COURT: Well, he had to have his probable cause when he entered that building, or else he hasn't any. He can't stand on what he did after that.

MR. RIORDAN: No, that's right, Your Honor. Now, what happened from the time he entered, rang the bell, till the defendant opened the door? He discussed with them, told them he was a narcotics agent and wanted to talk to them. So, the fellow slams the door on him and runs, and this caused the break-in. Don't you think that's reasonable for a narcotics agent, or any law-enforcing officer, that that is reasonable?

THE COURT: What have we got as to evidence, Mr. Abrams?

MR. ABRAMS: First of all, this isn't reliable information at all. The officer hesitated for a moment when Mr. Riordan asked him if it was a reliable informant. He said, he thought so; but in questioning, it was ascertained they had arrested a person for narcotics violation, he was in possession of narcotics, and while under arrest, he says he got the narcotics from someone. Now, the cases hold that that doesn't constitute probable cause at all, and it isn't reliable information. In the United States vs. Jeffers—

[fol. 69] THE COURT: Well, let's start at one premise here. If it is reliable information, it does constitute probable cause; doesn't it?

MR. ABRAMS: Not in and of itself, without independent investigation, the cases hold. There must be more to

go with the information. They have got to have—it's got to be supplemented by independent investigation and observation by the officers, supplementing that, giving some truth or veracity to the information that they received. Number one, they didn't have reliable information from reliable, proven reliable in the past, from the informer. That's number one. The cases so hold.

Number two, they have nothing else to go along with it.

THE COURT: The cases hold that if the agent believes and has reason to believe and has acted upon the information—and it is reliable in his opinion—reliable information based upon all of the circumstances surrounding the individual who gives him the information, what they know about him. As to Wong, he testified he knew this man for six weeks; and he acted under this man's—under this information.

MR. ABRAMS: He knew this man for six weeks from investigating this man, not from conducting or getting information from him.

THE COURT: That's part of the thing. That's investigation. I mean, you don't have to have—

[fol. 70] MR. ABRAMS: I think that is investigation of the informant.

THE COURT: Previous valid information. It certainly is information upon which you can rely, but that is not exclusively. If there is other reason to believe the informant is reliable—

MR. ABRAMS: They don't have anything, Your Honor; they haven't produced anything further. This is the first information they ever received from this person and only after he was arrested for a narcotics violation. That is the evidence here, and it isn't a case whereon these informants—the cases generally—I have read dozens of them, where they have been upheld, together with other investigation—that the officer in this case—in those cases—the officers have had information from the same source on any number of occasions. They have had successful confessions based on that information through time and recurrence and frequent arrests, from the same source of information; and it is proved to be reliable. But the cases hold that a person under arrest—

MR. RIORDAN: The rule has changed, Mr. Abrams, in the last two or three months. If I may cite the Ninth Circuit case of Rogers vs. The United States, just handed down less than a year ago; and I also prosecuted Mr. and Mrs. Rogers. The first time I saw her in that case, [fol. 71] they had the informer across the border. It was a border case, Mexican border. I am referring not to a borderline case, in which they took a suspect, the customs officer, and he asked him about the fact, "We understand you are dealing again in narcotics." And the informer says, "I am not, but I know where some is; Mrs. Rogers has some." And they asked, "Where is she?" He said, "She went across in a Greyhound bus an hour earlier, and it waiting for Mr. Rogers at the Greyhound bus station in the City of San Diego." So with that information, the agents tco this informant and went to the Greyhound bus station and the informant says, "There is Mrs. Rogers, now," and the agents went up and arrested her; and there was the narcotic drugs. The could hold even though the informant never had given information before, that was the first time, the subsequent fact had proven him as being correct, and he was corroborated by means of finding her in the bus station at that particular time, that that was sufficient probable cause to seize Mrs. Rogers. So, we say the same here. He slammed the door in the face of the agent—

MR. ABRAMS: Aside from that, here's a combination place of business and home, at 6:30 in the morning, when the business portion of the place is closed.

THE COURT: They have to have probable cause; they have to have reason—

MR. ABRAMS: The cases go further and say, except [fol. 72] in extreme emergency, a warrant is required. The Drayton case, 205 Fed 2d 35, MacDonald vs. The United States—

MR. RIORDAN: This is 6:30 in the morning.

MR. ABRAMS: The place is closed; it is not open for business.

THE COURT: That doesn't give sanctity to it. The issue is whether the agent is justified in—

MR. ABRAMS: They are required to have a warrant and could easily have procured a warrant, either for arrest or search. I think the cases are very firm on that, Your Honor.

THE COURT: I think we have taken enough time.

MR. ABRAMS: I don't see how—any possible way the government could justify the breaking in of this man's home and arresting him and extracting from him a confession or admission, or anything at all.

THE COURT: All right. We will proceed with the case; and I will overrule the objection.

MR. RIORDAN: Take the stand, Mr. Nickoloff.

ROBERT NICKOLOFF,

having been previously sworn, resumed the stand and testified further as follows:

DIRECT EXAMINATION

BY MR. RIORDAN:

Q Mr. Nickoloff, then upon entering the premises at 1733 Leavenworth Street, did you have a conversation [fol. 73] with the defendant, Mr. Toy?

A Yes, sir; I did.

Q What did you say, and what did he say?

MR. ABRAMS: I will make the objection now as to any conversation between the officer and the defendant Toy, on the grounds there has been no proof of corpus delicti. The government is bound to produce substantial independent evidence of the commission of the crime before—to predicate—upon which to predicate the admission of—any admission or confessions or statements or declarations by a defendant.

THE COURT: I suppose this is an offer to prove the conspiracy, is it?

MR. RIORDAN: Yes, Your Honor. At this time, I don't believe from what I know, this is going to be any confession or admission.

THE COURT: All right; proceed.

MR. ABRAMS: I make the objection—

THE COURT: I will overrule it at this time. You can make a motion later.

MR. RIORDAN: Q What did you say, and what did he say?

A I was there with agent Casey and agent Casey was the first one to ask him a question. Agent Casey asked him, or rather told him that, "We understand you were furnishing narcotics to Hom Way," and Mr. Toy said, [fol. 74] "No I wasn't." Mr. Casey again stated, "Well, we just talked to him. He is under arrest, and he says he got narcotics from you." He says, "No, I haven't been selling any narcotics at all." Then he said, "However, I do know somebody who has." Agent Casey asked him who, and he said, "Well, I only know him as Johnny. I don't know his last name." I then asked him where Johnny lived, and he said he lived out on the avenues, 11th Avenue. He didn't know the exact address, but it was the second house from the corner of the extension of Turk Street. I forget the exact street name. He said it was—he described the house to us, it was a remodeled front of a house with a white trim, sort of beige color, and he said he had been there the night before; and we asked him how much stuff—I asked him how much stuff Johnny had, and he said he had about a piece, and that Johnny had a bedroom there, it was his folks' house, and the bedroom was upstairs. He described where the bedroom was, and he also said usually about eight o'clock in the morning that the mother would come out with the children to go to school.

Immediately upon receiving this information, I left with agent Hazelton and Police Officers Erriet and Fogarty; and went out to the described premises. We arrived there just a few minutes after eight o'clock in the morning. Just about five minutes after arriving, a youngster came out of the house, and a man and a woman; and we approached the woman. I identified myself, [fol. 75] showed her my badge, and asked her if Johnny was home. She said, "Yes, he is upstairs."

Q Just a moment. To shorten this, you used the word "a piece." What does that mean in narcotics traffic?

A Approximately an ounce.

Q Let me show you Exhibit 1 for identification and ask you if you can identify that.

A Yes, sir; I can. This is a paper sack which Johnny Yee—

MR. ABRAMS: Just a moment, please. Allow me an opportunity to make a timely objection. You asked him to describe it—I assume you are asking him to describe it, what it is, not where he got it.

MR. RIORDAN: To identify it.

Q How did you identify it?

A I identify it by my initials, which I placed thereon; the time, 8:10 a.m.; the date, 6/4/59, on the paper sack. I also placed it on the bindles, the white paper bindles, and on the four rubber contraceptives.

Q From where did you obtain that?

A From Johnny Yee.

MR. ABRAMS: Just a moment. That, I object to. I object to any testimony of this officer as to where he obtained these objects which he has described, on the ground that they were obtained—the whereabouts of these objects.

[fol. 76] THE COURT: Because their existence are part of the fruits—part of the breaking in of the laundry on Leavenworth Street, is that your opinion?

MR. ABRAMS: All obtained by reason of the illegal entry into the premises of the defendant, Toy; and illegal questioning of the defendant Toy, in violation of his constitutional rights.

THE COURT: Overruled.

MR. RIORDAN: Q Go ahead.

A Johnny Yee surrendered them to me in the upstairs bedroom, as had been described to me by Mr. Toy. They were in the dresser drawer in the bedroom. In this paper sack was contained the four rubber contraceptives and this small plastic case, about four inches long and one inch by one inch, in which were the white paper bindles.

Q What did you ultimately do with Exhibit 1 for identification?

A I sealed it and delivered it to the chemist that same day.

MR. RIORDAN: No further questions. Just before the cross examination, I ask that the statement identified by the witness, Johnny Yee, be marked for identification, Your Honor.

THE COURT: For identification only?

MR. RIORDAN: For identification only, Your Honor, [fol. 77] at this time.

THE COURT: Very well, Government's Exhibit 2 for identification.

THE CLERK: Government's Exhibit 2, marked for identification.

(Statement of Johnny Yee dated June 9, 1959, marked Plaintiff's Exhibit 2 for identification.)

MR. RIORDAN: No further questions.

CROSS-EXAMINATION

BY MR. ADAMS:

Q Mr. Nickoloff, you were one of the federal narcotics agents who accompanied Alton Wong to these premises, 1733 Leavenworth, on the morning of June 4, 1959.

A Yes, sir; I was.

Q And as I understand, after you—as I understand you, you talked to the defendant and obtained this information after the defendant was handcuffed by agent Wong; is that right, Alton Wong?

A I don't know who had handcuffed him; he had been previously handcuffed, yes.

Q Been handcuffed?

A Yes, sir.

Q And placed under arrest?

A Yes, sir.

Q And then you and other agents talked to him?

[fol. 78] A That is correct, sir.

Q And some agents searched the premises at the same time, did they not?

A That is correct; yes, sir.

Q Searched his rooms and living quarters?

A Yes, sir; in fact, I had done some searching before I talked with him.

Q It is a fact, is it not, that while agent Wong was pursuing the defendant, Toy, and handcuffing him, other agents were going about the premises making a search; is that right?

A Subsequent to, not at the same time. Agent Wong entered first, myself and other agents entered thereafter; he was—when I entered, Mr. Toy already had handcuffs on.

Q This was all within a matter of minutes?

A A matter of minutes, but not at the same time.

Q And then, after you talked to the defendant Toy, and he told you what you have testified to, you immediately went out with other agents to the home of Yee; is that it?

A Yes, sir; Johnny Yee.

Q And you made a search of his premises, Johnny Yee's home or premises?

A No, I didn't actually make a search. He surrendered the narcotics.

Q He was there at the time?

[fol. 79] A He was there, yes, sir.

Q And you found these objects which are—therein, in Yee's house; is that correct?

A That is correct, sir.

MR. ABRAMS: That's all.

MR. RIORDAN: No further questions.

(Witness excused.)

MR. RIORDAN: Mr. William Wong.

WILLIAM WONG,

having been previously duly sworn, was recalled and testified further as follows:

DIRECT EXAMINATION

BY MR. RIORDAN:

Q Mr. Wong, sometime after the arrest of the defendant James Toy, did you have a conversation with him in connection with the—with these narcotics?

A Yes, sir; I did.

Q Exhibit 1 for identification?
A Yes, sir; I did.
Q And where did that conversation take place?
A At the Federal Bureau of Narcotics offices.
Q And that is in San Francisco, here?
A Yes, sir.
Q And approximately what time?
A I don't recall the exact time now, sir.
[fol. 80] Q Could you approximate it?
A During the working day.
Q What day?
A I believe it was on the 9th of June.
Q Oh, I see.
A I spoke with him on the day after, also, on the 5th of June, I believe.
Q And did you discuss the narcotics with him?
A Yes, sir; I did.
Q I see. And did you give him any advice before you discussed these matters with him?
A Yes, sir.
Q Would you tell us, in that connection—in connection with the advice you gave him, what you said and what he said.
A To the best of my recollection, I told him I wanted to take a statement from him, if he would give one voluntarily, concerning his knowledge of these narcotics; and that he was entitled to the advice of an attorney, that he didn't have to answer these questions or give any statement unless he voluntarily did so; and that they could be used against him if he did give them.
Q After this advice, did he—was he so willing to make a statement then?
A Yes, sir, he did.
Q Did you make any promises to him of immunity or [fol. 81] leniency?
A No, sir; I told him I was not making any promises or any bargains or deals or anything with him.
Q And then, without going into the statement, did you discuss the matter with him?
A Yes, sir.
Q And then, did you prepare a written statement?

A Yes, sir; I did.

Q Would you tell us how the mechanics, beginning with how you got the information, the typing and all that?

A First of all, I sat down with him after advising him of his rights; and we discussed it just verbally between the two of us, question and answer. After that, I asked him to repeat the whole thing to me, at which time I took it down in rough note form, and then subsequently, I submitted those notes to a clerk-secretary and she prepared the typewritten statement.

Q And then after it was prepared, did you show it to the defendant, James Wah Toy?

A Yes, sir; I did.

Q And what was done then? What was the procedure followed, if I may know, what you did; what you observed him doing?

A I showed him the statement, and I read it to him in English, and then I also interpreted in Chinese for him; [fol. 82] and I asked him if he were able to read it. First he said he only had a couple of years school, but I said, "Well, if you are able to read it, will you proceed, and read it slowly"; which he did. He read it out loud to me, and there was only one word he couldn't pronounce, but he knew the meaning of it. Then, he also said there were corrections to be made on the statement; and I asked him to make those corrections, which he did, by his own hand; and thereafter, I asked him if he wished to sign this statement, and he said it was all right with him, but he wanted to know first if the other persons involved in the case had signed theirs.

MR. ABRAMS: Just a moment. I want to object to the introduction of the statement in evidence, or any conversation between the witness and the defendant. I thought this was just going to identify the statement; but he seems to be going into that quite a bit. He is going into part of—his discussion with the defendant, which I must make my objection to. I might as well make it now, as to the whole thing, as to the introduction of this statement; if you offer it in evidence, or any discussion or conversation between the agent, the witness here, and the defendant.

MR. RIORDAN: I think your move is very noble, but I think you are just one or two questions ahead. If it please the Court, I am only laying the foundation at the present time, not for admissions or confessions at the present time, but laying the foundation for his statement. [fol. 83] MR. ABRAMS: Then keep the witness away from any actual discussion between him and the defendant.

MR. RIORDAN: I may be wrong, but if I recall the last statement made concerned the signing of the statement, would he or wouldn't he.

MR. ABRAMS: Well, he is starting to talk about—.

THE COURT: All right. Get the objection in the record. It won't take so long to put the objection in the record.

MR. ABRAMS: On the grounds heretofore urged, Your Honor, that it is the result of illegal entry into the private premises and living quarters of the defendant Toy, in violation of his constitutional rights.

THE COURT: Very well.

MR. ABRAMS: And the additional grounds also, that there is no proof of the corpus delecti, or the crime, as yet, as to the defendant Toy, to allow the introduction of any such statements or admissions by the defendant.

THE COURT: All right. I will overrule it.

MR. RIORDAN: Q. Now, as I understand it, when the statement was prepared, you read it, he read it, and you read it to him in Chinese. Now, you had a discussion in regards to signing the document?

A Yes, sir.

Q What did he say and what did you say?

[fol. 84] A I asked him at that time if he wished to sign this statement. He said he had no objection to doing so, but first he wanted to know if the others involved in this investigation or case had signed theirs. I said I couldn't give him that information in all fairness to other persons; and he said, "Well, unless you can prove to me that they have signed theirs, I don't want to sign it."

I asked him if all the information contained in this statement which he had read and I had read to him were true and correct, and he stated, "Yes, they were," and I

asked if the corrections made on it were in his hand, and he said they were.

Q Now, I will show you a document; is that the statement that you have described and have just talked about?

A Yes, sir; it is.

Q We ask that this be marked Government's Exhibit next in order for identification. I will show it to the defense counsel.

THE CLERK: Government's Exhibit 3, marked for identification.

(Statement of James Wah Toy marked Plaintiff's Exhibit 3 for identification.)

THE COURT: We will recess a few moments.

MR. RIORDAN: I will give you both statements.

THE COURT: Yes.

[fol. 85] MR. RIORDAN: We will try and speed it along.

THE COURT: All right. We will recess for a few moments.

(Short recess)

MR. RIORDAN: Just before we proceed, I gave the documents to Mr. Abrams.

Now, the Rogers case, which I cited, Rogers against the United States, decided May 11, 1959, is one where—and this is your law book, Your Honor, which I will give to your clerk—the citation is 267 Fed 2d 79.

MR. ABRAMS: 267 Fed 2d 79?

MR. RIORDAN: Yes, 79, and that is where information is received from an informant, whether reliable or not, plus subsequent observations and activities with the investigation leading to even greater cause to believe a crime is being committed—

THE COURT: This Rogers woman, as I recall, she crossed the border; she took a ride into San Diego, rode the bus; and—

MR. RIORDAN: They stopped the man at the border, and he says, "Mrs. Rogers has the stuff. You will find her dressed so and so in the depot," as I remember; so they went up there and looked at the depot, and there

is the woman and they made the arrest; and they searched her person.

THE COURT: Yes, they made the arrest.

MR. RIORDAN: And he says you should have gone and got a warrant, and Judge Burke said on probable [fol. 86] cause it is just what a reasonable man believes, and there should be no trickery used in reaching a decision as to probable cause; but it must be made then and there. The agent must act reasonably on the information he has.

THE COURT: All right. We are at this stage now, we are up to these statements.

MR. RIORDAN: I gave him the opportunity during the recess—he was asked to read both of them, Number 3 for identification.

THE COURT: Have you offered it?

MR. RIORDAN: Just for identification, Your Honor. I just want to get this one thing and we will do all of them together. This will be the end.

Q Did you have a conversation with the defendant, Wong Sun?

A Yes, sir, I did.

Q And that is after his arrest, is that correct?

A That is correct, sir.

Q And where did you have your conversation with him in connection with this investigation?

A At the Federal Bureau of Narcotics office.

Q When was this?

A On or about June 9th, to the best of my recollection. Agent Nickoloff was with me.

Q Before making any inquiries of him, did you give [fol. 87] him any advice or discuss with him his rights?

A Yes, sir; I did.

Q In that connection, what did you say to him?

A Substantially the same that I advised the other defendant, James Wah Toy.

Q Could I ask you to repeat it, substantially, as you best remember?

A That he didn't have to answer any questions or give any information unless he did so voluntarily; and if he did, that information might be used against him; that he

was entitled to an attorney or advise of counsel; and any information he gave us of his own, voluntarily, of his own free will, and that—

Q Did you make any promises to him or offer him immunity or lenience?

A No, no bargains; no, nothing.

Q I see. Then, would you tell us, did you finally obtain a statement from him in writing?

A Yes, sir; we did.

Q Will you tell us the mechanics that were used to develop the statement?

A Agent Nickoloff and I took rough notes. After we discussed this in question and answer form, we took rough notes. From these notes, we submitted it to the clerk-secretary, typist—

[fol. 88] Q To prepare the statement?

A For the preparing of the statement, yes, sir.

Q And the statement was prepared?

A Yes, sir.

Q By the secretary?

A Yes, sir.

Q And after its preparation, what did you do with this statement, in connection with the defendant Wong Sun?

A We asked him to read the statement and he said he couldn't read English, and so I read it to him in both English and Chinese, and asked him if it was correct to the best of his knowledge; and he said, yes.

We asked him if there were any corrections he wished to make, and he said it was all correct, to his knowledge.

Q But did he sign it?

A No, sir; he refused to sign the statement. He wanted to know if the other parties had—

MR. ABRAMS: Well, now, I want to start making some objections to this.

THE COURT: Same objections?

MR. ABRAMS: Along the same lines as I did as to the other defendant, Toy. I want to examine on voir dire, and show that all this was after the illegal arrest of Wong Sun; and I want to show the circumstances of his arrest.

THE COURT: They are not offering anything except [fol. 89] the statement as to this man, or the other man, as far as I can see.

MR. ABRAMS: Before they do, I want to show the circumstances.

THE COURT: Before it is offered in evidence?

MR. ABRAMS: Yes, or before this gentleman on the stand gives any testimony as to any conversations between him and Wong Sun.

THE COURT: Well, this whole statement had to do with the conversation; it's the same thing.

MR. ABRAMS: Well, he is beginning to give some conversations between himself and the defendant; and I want to show this all takes place after the illegal arrest of this defendant. We have a similar situation of forced entry into his home. We want to develop that, at least for the record, Your Honor, and Your Honor's consideration of the record.

THE COURT: I guess we are going to have to come back.

MR. RIORDAN: The statement that was prepared and was not signed by Mr. Wong Sun, I will ask that that be marked United States exhibit next in order.

THE COURT: For identification?

MR. RIORDAN: Yes, for identification.

THE CLERK: Government's Exhibit 4, marked for identification.

(Statement of Wong Sun, dated June 9, 1959, marked Plaintiff's Exhibit 4 for identification.)

[fol. 90] MR. RIORDAN: Knowing now that we are running well over our scheduled estimate of what time it would take to try this case, I am now through with the witness, and the Government is about ready, after examination—I just want to make this statement so Your Honor can schedule it as you so desire. At the conclusion of the cross-examination, I am then going to make an offer that all documents heretofore marked for identification be admitted into evidence, except the statement of Yee, which I would want to remain for identification only,

to match up with the record of the clerk here—of the reporter—so you may cross-examine, if you desire.

MR. ABRAMS: Well, I don't think there would be any necessity for cross-examination just as far as this officer has gone on the manner in which the statements were taken. The objection I want to make wouldn't be timely, as to the introduction.

THE COURT: They are not offered yet?

MR. ABRAMS: No, so I have no examination to make as to the manner in which it was taken. No cross-examination.

MR. RIORDAN: No cross-examination.

THE COURT: He says he is going to offer these statements—

MR. ABRAMS: He is going to later, and I will make my objection, and go into the voir dire at that time.

THE COURT: Certainly.

[fol. 91] COLLOQUY BETWEEN COURT AND COUNSEL

MR. RIORDAN: All right; thank you, Mr. Wong.

Now, at this time, Your Honor, the Government has concluded its case, and herewith offers into evidence all exhibits heretofore marked for identification with the exception of the statement of the witness Johnny Yee, which we will ask to remain in the record, but not admitted into evidence in this case.

THE COURT: You are not offering these narcotics? You have laid no foundation.

MR. RIORDAN: Yes, the narcotics too, Your Honor.

THE COURT: What foundation?

MR. RIORDAN: Pardon?

THE COURT: What testimony have you other than anything based on the statements made?

MR. RIORDAN: The statement of the defendant.

THE COURT: Entirely on the statement?

MR. RIORDAN: The statement and the testimony—I will ask to be allowed to read the statements into evidence, Your Honor.

MR. ABRAMS: Assuming the statements are admissions of the defendant—

THE COURT: Wait a minute, now.

MR. ABRAMS: You haven't proved an overt act. What's the overt act.

MR. RIORDAN: I can prove them all out of the state-[fol. 92] ments. May I read the statements to the Court?

MR. ABRAMS: You cannot use the statements. That is elementary. You cannot prove a crime by admissions or confessions.

MR. RIORDAN: An identical case was decided by Judge Burke a week ago. It is the same thing. I don't know what objection counsel has, nor what objection Your Honor has, except if Your Honor is thinking of the principle of law that the Government must produce and prove a corpus delecti before the statements are admitted into evidence, and made a part of the case—of the over-all case, which is not the federal law.

THE COURT: That's right.

MR. RIORDAN: —there just must be some cooperation, which I believe was given in this case here. What do we have? We have the contraband. We have it concealed, and we found it. That's a crime, concealment of contraband. We used the confession to show they participated in its concealment, and transportation, and on the dates set forth on those statements, which are the overt acts here.

MR. ABRAMS: You have to have substantial independent evidence, and the proof of the crime, or corpus delecti, whether it be conspiracy or substantive count, aside from any admission or confession of the defendant. We had that situation in a trial recently.

[fol. 93] THE COURT: This evidence right here of these narcotics is pretty substantial.

MR. RIORDAN: If I may cite some law to Your Honor on this—I anticipated the difficulty, as you can probably understand. I refer Your Honor to probably the leading case in this district, the Hugh Bryson case, which may be found at 238 Fed 2d 657. The substantial point there is evidence corroborating an admission or confession need not independently establish the admitted facts, and it is sufficient if it merely verifies the truth of the confession. The federal law, as distinguished from the California law, is that you don't need to establish a corpus delecti for

admission of the confession; but, as Mr. Abrams says, some evidence. But he uses another term; he uses the term "substantial." The word is "same." Now, what is the meaning of the word "same," as established by the federal court cases? Some evidence only means that sufficient to trier of facts, independent of the confession that would lead the trier of facts to believe that the statements therein are true. It need not prove independently every statement made in the confession; but some evidence that the trier of facts would believe they confess to be a true one, or the facts stated therein to be true.

Now, we have the case, the leading case, Daeche vs. The United States. That is found in 250 Fed 566; and that established the basic law which is the case he cited [fol. 94] throughout this particular type of argument; and that generally holds that while some sort of corroboration to a confession is necessary to a confession, the rule prevails in the Federal courts that corroborating circumstances need not be sufficient in themselves to establish the corpus delectic, either beyond reasonable doubt or to any preponderance of proof. We also find that same statement in Opper vs. The United States, a Supreme Court case, 348 U.S. 84. The same principle is followed by Judge Burke in this district in the United States vs. William Joseph *Bowles*, Docket 36884, decided by a jury a week ago.

In that case, another contraband, a sawed-off shotgun, a violation of firearms act was found, and there were identical facts in that case. All we had in that case was —you had the illegal weapon; you had the confession of the defendant; the finding of the contraband in the hands of the first party, not a defendant in the particular suit. The identical situation was there, as is here. Under some urging, Judge Burke let the case to the jury, and they returned a verdict. There is an identical situation here. Contraband was found in the hands of a third person, Johnny Yee. We were led to Johnny Yee by independent witnesses, the agents who first went to defendant Toy, and then from the defendant Toy to the home of Johnny Yee where the contraband was found. They not only conspired to conceal and transport the narcotics there, but

[fol. 95] by their own confessions here, the exhibits in evidence, they admitted on the days therein set forth, that the narcotics drugs were transported, concealed and used.

THE COURT: Well, you want to take these things up?

MR. ABRAMS: I presume counsel wants to make an offer into evidence of these statements.

THE COURT: He has.

MR. ABRAMS: Well, I want to make my objection.

THE COURT: Well, let's do it all in the morning.

MR. ABRAMS: I want to make the voir dire examination to show that—

THE COURT: Well, we can do that in the morning.

(Off-the-record discussion.)

THE COURT: All right, we will set this for 10:30 tomorrow morning.

THE CLERK: Court is now adjourned until 10:00 a.m., and 10:30 a.m. for the further trial of this case.

(Whereupon an adjournment was taken until 10:30 a.m., October 16, 1959.)

[fol. 96] MORNING SESSION, FRIDAY, OCTOBER 16, 1959, 10:00 O'CLOCK, A.M.

THE CLERK: United States versus Wong Sun and James Wah Toy for further trial.

MR. RIORDAN: Ready.

MR. ABRAMS: Ready.

THE COURT: You are going ahead on this?

MR. ABRAMS: The young lady that I had requested here yesterday was here, took off from her work to be here, and she thought she might lose her position by being here today, but she did promise she would make an effort to be here by 11:00. But in the meantime I thought I would put the defendant on for a few minutes and put her on as soon as I can.

MR. RIORDAN: Has Your Honor made a ruling reserving ruling on the admission of the—

THE COURT: I am just reserving it on these last two statements, yes. Mr. Abrams said he wanted to go into the voir dire on the one statement like he did on the other.

MR. ABRAMS: I want to make some objections.

THE COURT: Yes, that is what I mean, after you have got your point here.

MR. ABRAMS: Yes; will you step forward?

[fol. 97] ANNIE LEONG,

a witness called on behalf of the defendants, being first duly sworn, testified as follows:

THE CLERK: Please state your name to the Court.

THE WITNESS: Annie Leong.

DIRECT EXAMINATION

BY MR. ABRAMS:

Q How old are you?
A Twenty-five.
Q Where do you live?
A 2628 Franklin.
Q Franklin Street, San Francisco?
A That's right.
Q You lived there on June 3 and 4?
A Yes.
Q Of this year?
A Yes.
Q Lived there for some time prior thereto, also?
A Yes.
Q You still live there?
A Yes.
Q Are you presently employed?
A Yes, I am.
Q Where are you employed?
A United Parcel Service.

[fol. 98] Q Now, 2628 Franklin Street, what type of a premise is that?
A It is a flat.
Q A dwelling place, a home?
A Yes, it is a home.
Q Your home?
A Yes, it is my home.
Q How many rooms in the flat?
A Six.

Q Who lives there with you?
A I have two brothers, my sister and my brother-in-law.
Q Your brother-in law is the defendant—
A Sun Wong.
Q Sun Wong?
A Yes.
Q Or Wong Sun, the same thing?
A Yes.
Q He lives there with you?
A Yes.
Q And his wife?
A Yes.
Q Who is your sister?
A Yes.
Q Did they live there with you; and your two brothers also lived with you there on June 3 and 4 of this year?
[fol. 99] A Yes, we did.
Q You say this is a six-room flat?
A Yes.
Q All furnished up as a home?
A Yes.
Q Bedrooms—how many bedrooms?
A Three bedrooms.
Q Three bedrooms; fully equipped?
A Yes.
Q Kitchen?
A Kitchen.
Q Dining room?
A Living room.
Q A living room, toilet, bathroom?
A Yes.
Q Now, do you recall the morning of June the 4th of this year federal narcotics agents coming to your residence there at 2628 Franklin Street?
A I did not know who they were.
Q You recall some gentlemen coming there at that time?
A Yes, that man over there.
Q One of the—which gentleman was it—may it be stipulated—

A I think his name is Alton Wong.

MR. ABRAMS: Yes. May it be stipulated Alton Wong, [fol. 100] the federal narcotics agent in court?

MR. RIORDAN: So stipulated.

MR. ABRAMS: Q At that time, you did not know who he was?

A No, I did not.

Q You since learned that he is a federal narcotics agent?

A Yes.

Q Others were with him at that time?

A No, he was alone when he rang the doorbell.

Q About what time in the morning was it?

A It was about noon.

Q About noon?

A Yes.

Q The doorbell rang?

A Yes.

Q Now, is this a lower flat or an upper flat?

A It is an upper flat.

Q An upper flat. On the second floor?

A Second floor.

Q Second floor. The door leading up, leading to the flat, the street is on the first floor?

A You would consider it the third floor; there is a garage underneath, so that is the first floor and the landlord lives on the second; we are on the third, I guess.

Q In other words, one has to go up a flight of stairs [fol. 101] from the street to reach the door to your flat?

A No, it's down on the street, the door is on the street.

Q On the ground floor?

A Yes, two flights of stairs, one short one and one long.

Q Two flights of stairs up to your flat; is it straight stairway or is it a winding stairway?

A The one from the door is a straight stairway; and the one to the house you would say is a winding; you have to go around to get upstairs.

Q Upstairs; that's after you enter the door of your flat?

A Pardon?

Q Is that after you enter the door to your flat?
A The winding?
Q Yes.
A Yes.
Q All right. Now, you say the doorbell rang?
A Yes.
Q About noon?
A Yes.
Q Who answered the door?
A I did.
Q How did you answer the door?
A I rang the buzzer.
Q Where was the buzzer?
A Down on the first—the short flight of stairs.
[fol. 102] Q Would you say about halfway down to the door?
A It is about 25 steps, I would say.
Q Still leading to the door?
A Before I get to the door, yes.
Q I see. From your position on the stairway where you past the buzzer to open the door, could you see who was at the door?
A No.
Q You could not see who was at the door?
A No.
Q But you pushed the buzzer; and what happened?
A Mr. Wong, here, opened the door and asked for a Mr. Leong.
Q Well, did you see him when he opened the door?
A Yes, I saw him.
Q Did he come inside the door?
A No, I don't think he did; I think he was outside.
Q How did you see him; did you have to go down a few more steps? What was that?
A I just went down to—(indicating).
Q You twisted your head in such a position that you could see?
A Yes.
Q What conversation took place at that time?
A He asked for a Mr. Leong, the owner of the house. I said there is no Mr. Leong as the owner of the house;

[fol. 103] I own the place. He says, well, if I can recollect, I think he said—I can't think of it right now, but he did ask for Mr. Leong.

Q Did he ask for anyone else at that time?

A No, he didn't.

Q Just Mr. Leong?

A That is right.

Q Let me ask you, are you the owner of the place?

A Yes, I am.

Q You own the property?

A No, I do not own the property, but it is rented by me.

Q Oh, you rent the flat?

A That's right.

Q That's what you meant by owner?

A That's right.

Q You are the tenant?

A Yes.

Q Have you been the tenant right along?

A Yes.

Q Does your name appear on the outside of the door on a mailbox or any place by the button?

A No, there is no name on there at all.

Q No name.

A No.

Q Well, then, what occurred; what was said?

A I said, "Well, there is no Mr. Leong here; I am the [fol. 104] owner of the place; and, you know, I don't know who you are looking for." He said thank you and I thought he was going to close the door; and I turned around to go back up the stairs, up the winding stairway there, and all of a sudden I heard about six footsteps coming up; so I turned around and one of them grabbed me and—

Q Now, wait just a moment. You turned around, and where were you when you turned around?

A I was going up the stairs.

Q You were going up the stairway?

A Yes.

Q You say one of them grabbed you. Now, were there others besides this gentleman that you identify as Mr. Wong?

A I think there was approximately six of them.
Q About six other men, six altogether?
A Yes.
Q All dressed in plain clothes?
A Yes.
Q Now, Mr. Wong is of Chinese descent?
A That is right.
Q You can see that. Were the others Chinese?
A No, he was the only one.
Q They were not Chinese?
A No.
Q Now, did you later learn that all of them were [fol. 105] federal narcotics agents?
A All—well, I was kind of nervous at the time because I kept asking what was wrong and nobody said anything to me.
Q Let me ask you this: You say one of the grabbed you?
A Yes.
Q By the arm?
A Yes.
Q And you were on the steps?
A Yes.
Q And then what happened?
A Well, he pulled me straight into the bedroom where Sun Wong and my sister were sleeping—and I guess knowing that—I guess I was mistaken for his wife at first, because we do look quite a bit alike.
Q You resemble Mr. Sun Wong's wife, to some extent?
A Yes.
Q At any rate you were taken, you say, by the man that grabbed your arm, and you were taken into the bedroom?
A Yes, and they handcuffed him within seconds.
Q Now, wait. You were taken into the bedroom in which the defendant Sun Wong and his wife were sleeping?
A Yes.
Q They were sleeping at the time?
A Yes.
Q That's a bedroom in this flat?

[fol. 106] A Yes.
Q And you say somebody was handcuffed.
A Yes.
Q Who was handcuffed?
A Sun Wong was.
Q Who handcuffed him?
A I don't know his name.
Q One of these gentlemen?
A Yes.
Q One of these men handcuffed him. Was that done immediately?
A Within seconds, yes.
Q Within seconds.
A He wasn't even awake yet, I don't think.
Q I see. Did they at any time thereabouts, did any one of these gentlemen announce themselves and indicate who they were?
A No.
Q What?
A No, they didn't.
Q Did you see any pistols or guns displayed by any of them?
A No, I did not.
Q All right. Then what happened after Sun Wong was handcuffed?
[fol. 107] A They brought him to the living room.
Q These gentlemen brought him into the living room?
A Yes.
Q What was done with you, anything?
A I was sitting in my bedroom and I was in the living room for a while.
Q How did you happen to go into the living room?
A One of the gentlemen told me to go in.
Q Told you to go into the living room?
A Yes.
Q How about the defendant Sun Wong's wife that was in bed?
A She was in her room; they kept her in her room.
Q They kept her in the bedroom?
A Yes.
Q Someone stayed with her in the bedroom?
A Yes.

Q One of these gentlemen?

A Yes.

Q All right. Now, did any of these gentlemen conduct a search of the premises?

A Yes, they did; they all did. In fact, they went over it twice.

Q How long were they there altogether?

A Oh, I would say about an hour.

Q They remained in the flat about an hour?

[fol. 108] A Yes.

Q During a good deal of that time they were conducting a search of the rooms?

A Yes.

Q How did they conduct the search, were did they look?

A Every one of the rooms.

Q Where did they look, under rugs or—

A Yes.

Q —in the furniture, drawers, anything like that?

A There was a furnace that has been knocked out of the wall and there was a piece of wood put into it to close the hole; they tore that out, and they didn't replace it.

Q They looked there?

A Yes, and they took the beds apart.

Q They took the beds apart?

A Yes.

Q And looked in the beds?

A Yes.

Q And they looked in other furniture?

A Well, they said that I had kept my place very nice and they didn't have to tear it up.

Q Did they search the person of your or the defendant or his wife; search you personally, your clothing?

A They did not search me, no; but as far as my sister or Sun Wong, I don't know, because I was not there.

[fol. 109] Q You didn't see it?

A No.

Q Now, the front door was locked before the Agent Wong entered, is that true?

A Definitely, yes.

Q And you could only open it; you unlocked it or opened it by the buzzer that you pressed, is that correct?
A Yes.
Q That unlocked the door and allowed him to enter?
A Yes.
MR. ABRAMS: I think that is all, Your Honor.

CROSS-EXAMINATION

BY MR. RIORDAN:

Q You say you work for United Parcel, is that right?
A Yes.
Q How long have you worked there?
A Oh, about 18 months.
Q About 18 months; what are your working hours?
A 8:30 to 5:00.
Q Where were you working on June 4?
A It was on my vacation, two days before I had to go back to work.
Q I see. Now, you say agent Wong rang the doorbell to the flat, is that right.
A Yes, he did.
[fol. 110] Q And you opened the door and let him in?
A Yes, I did.
Q You said he asked for Mr. Leong?
A That's right.
Q Could he possibly have asked for Mr. Wong?
A No.
Q Similar sounding, aren't they?
A No, they are not, now when you're Chinese.
Q Then you say you were on the first landing, is that right?
A That is right.
Q He came up the stairs?
A Yes, he did—no, he did not come up the stairs, sir.
Q He didn't?
A No, he was downstairs where the door is. In fact, he did not even enter the house.
Q He never entered the house?
A No.
Q Who entered first?

A I don't know. I turned—all I know, I turned around and I heard footsteps coming up the stairs; that's it.

Q Who was the first to speak?

A I was, I guess.

Q Oh, let me see. Maybe your sister spoke first?

A My sister was in bed.

[fol. 111] Q She wasn't on the landing at all?

A No.

Q Are you sure that the agents didn't ask Chinese questions of your sister at the landing?

A My sister was not there, sir.

MR. RIORDAN: All right; no further questions.

MR. ABRAMS: That is all, Your Honor. May this witness be excused so she may return to work?

THE COURT: Yes, of course.

SUN WONG,

one of the defendants, being first duly sworn, testified as follows:

THE CLERK: Will you please state your name to the Court.

THE WITNESS: Sun Wong.

DIRECT EXAMINATION

BY MR. ABRAMS:

Q You are Sun Wong, one of the defendants in this case?

A Yes.

Q On June 3 and 4 of this year, 1959, were you living at 2628 Franklin Street, San Francisco?

A Yes.

Q Who were you living there with?

A Annie that was here a while ago; she's my sister-in-law, and her two brothers and my wife.

[fol. 112] Q Is that a six room flat?

MR. RIORDAN: I will stipulate, if you will just give a description of the flat.

MR. ABRAMS: Six-room flat, all right.

MR. RIORDAN: If you will describe it, it is all right with me.

MR. ABRAMS: All right.

Q Now, do you recall the morning of June 4 when some gentlemen came there?

A Yes.

Q Some of them are here in the courtroom?

A Yes, I recognize Mr. Al Wong, Alton Wong.

Q Did you later learn that these men that came, some of them were narcotics agents?

A Yes, later on when I was arrested I found out.

Q They told you they were federal narcotics agents?

MR. ABRAMS: You will stipulate?

MR. RIORDAN: I will stipulate.

MR. ABRAMS: Counsel stipulates that there were six, five or six men—six or seven men—and they were federal narcotics agents; all right.

Q Mr. Sun Wong, where were you at the time these men came to your place there?

A I was asleep.

Q Do you know what time it was, about?

[fol. 113] A It's a little after 11:00, between 11:00 and 12:00.

Q Were you asleep with anyone?

A My wife.

Q You and your wife were in bed?

A Yes, in my bed.

Q In one of the bedrooms?

A Yes.

Q Did the men come into your bedroom?

A Yes.

Q Did either you or your wife answer the doorbell when it rang?

A No, I was asleep.

Q All right. Now, when the men came into the bedroom where you were asleep with your wife, what did they do?

A While I was still half asleep one of the men put handcuffs on me and pulled me out to the other room.

Q All right. And then did these men search your place?

A After they shoved me out to the living room, after then, I saw them all searching the whole house.

MR. ABRAMS: That's all.

Will it be stipulated that the agents at that time didn't have a search warrant or warrant of arrest?

MR. RIORDAN: So stipulated.

[fol. 114] CROSS-EXAMINATION

BY MR. RIORDAN:

Q Mr. Wong Sun, have you ever been convicted of a felony?

MR. ABRAMS: Just a moment. If the Court please, I don't think that is proper cross-examination for this purpose.

THE COURT: What purpose; it goes to impeachment?

MR. ABRAMS: Credibility?

THE COURT: Certainly.

MR. ABRAMS: All right.

THE WITNESS: Yes, I have been arrested before.

MR. RIORDAN: Q Have you been convicted of a felony; have you done more than a year in jail?

MR. ABRAMS: Can you tell me, has he? If he has been convicted, I will stipulate. What was it, narcotics?

MR. RIORDAN: Yes.

MR. ABRAMS: So stipulated. He was convicted of narcotics before.

THE WITNESS: Yes.

MR. ABRAMS: So stipulated, Your Honor.

MR. RIORDAN: In the federal court?

MR. ABRAMS: So stipulated.

MR. RIORDAN: No further questions.

MR. ABRAMS: All right; step down.

(Witness excused.)

MR. RIORDAN: You want me to put on rebuttal [fol. 115] evidence, is that what—

MR. ABRAMS: I am all through with my showing on that. Do you want to rebut it in any way by putting on the officer? It is entirely up to you. You did in the previous case, I think.

MR. RIORDAN: Mr. Nickoloff, will you take the stand?

THE CLERK: Let the record show Mr. Nickoloff has been previously sworn.

ROBERT C. NICKOLOFF,

was recalled on behalf of the plaintiff, being previously sworn, testified further as follows in rebuttal:

DIRECT EXAMINATION

BY MR. RIORDAN:

Q Mr. Nickoloff, would you please tell us the information you received, and from whom, where and when, that the defendant Wong Sun was dealing in narcotics?

A I received information, not as to his name, but under the name of Sea Dog; that he was involved in narcotics, from Johnny Yee on the morning of June 4 of this year, shortly after Johnny Yee's arrest.

That information indicated Sea Dog, as he knew him, together with James Wah Toy, had brought the narcotics which Johnny Yee surrendered to his home approximately on the first of June, and also indicated that Sea Dog and James Wah Toy had been to Johnny Yee's residence [fol. 116] on June 3rd, the evening previous to his arrest.

Q Now, Johnny Yee, he only knew him by the name of Sea Dog?

A That's all he knew, yes.

Q Did he know where Wong Sun lived?

A No, sir.

Q Now, from where did you obtain information as to the residence of Wong Sun?

A From James Wah Toy.

Q The co-defendant in the case?

A The co-defendant.

Q Where did you receive this information from James Wah Toy?

A In the offices of the Bureau of Narcotics.

Q At about what time was this?

A This would have been around 10:30. I would say, in the morning of June 4.

Q Now, did James Wah Toy—he didn't know the address, did he, of Wong Sun?

A He was not absolutely certain, no, sir.

MR. ABRAMS: Your Honor, I presume my objection is still in the record as to—maybe I should renew my objection to this line of testimony, because Your Honor recalls—

THE COURT: Your objection goes to the fact that this was, all arose from the—

[fol. 117] MR. ABRAMS: Stemmed from—

THE COURT: Stemmed from and came out of the original statements made by—

MR. ABRAMS: Toy, the defendant.

THE COURT: Toy, the defendant, at the time of his arrest on Leavenworth Street.

MR. ABRAMS: And entry into his premises and—

THE COURT: The Leavenworth entry.

MR. ABRAMS: That's right. In other words, the officers first entered his—the defendant Toy's premises.

THE COURT: Yes.

MR. ABRAMS: On the early morning of June 4 at 6:30.

THE COURT: Now, all of this that we are inquiring into, this entry here which is an arrest, I take it, goes—or is based on your objection; your objection is based on the entry into the Leavenworth Street premises?

MR. ABRAMS: Yes.

THE COURT: Toy's premises?

MR. ABRAMS: In other words, all this information that the officer had obtained and is now testifying to stems from or was obtained, the information was obtained from the defendant Toy after this allegedly illegal entry into Toy's premises and his illegal arrest.

THE COURT: Yes.

MR. ABRAMS: And therefore, we contend—

[fol. 118] THE COURT: I understand.

MR. ABRAMS: The officer cannot use the fruits of an illegal arrest entry into a person's premises or illegal arrest, cannot use it for the purpose of basing upon it reasonable probable cause to make a search or arrest of another person at another place.

THE COURT: All right.

MR. RIORDAN: We put on the voir dire examination of how he entered the Franklin Street address. I'll just make a statement here, Your Honor, without going through it. Mr. Abrams has agreed—

THE COURT: He may agree; see if you can.

MR. RIORDAN: If you agree to this, this is the showing we will make. Number one, when they arrested Johnny Yee, Yee gave them information that Wong Sun, under the name of Sea Dog, was the dealer and brought the stuff to his house. Now, we had to identify this Sea Dog because Johnny Yee did not know his true name, nor his residence, and then by questioning James Wah Toy, the co-defendant, they ascertained the true name of Sea Dog, as Wong Sun, and he resided on Franklin Street, but he didn't know exactly where.

So Agent Nickoloff ordered Agent Al Wong to go with James Wah Toy and they drove out Franklin Street, and he says he lives there and Agent Wong tells me he went up and rang the doorbell; no conflict there and he [fol. 119] asked for, he tells me, he is going to testify, he asked for Mr. Wong. She says Mr. Leong. Wong tells me that knew the name, so they asked for Mr. Wong, and Wong will testify that she did open the door. But he will testify he came upstairs and had no conversation with Annie Leong; although he saw her, she went back up the stairs and he talked with Mrs. Wong Sun and identified himself and went in and made the arrest.

MR. ABRAMS: But he wasn't the first one in.

MR. RIORDAN: He says he was the first one in. Of course, there is a conflict. I don't care how he has gone in, he didn't break the door at this time; he rang the doorbell; he says, "I'm going to do my business."

MR. ABRAMS: He didn't break the door; the door was open.

MR. RIORDAN: The door was open, too, at the other place.

MR. ABRAMS: He entered the premises against the will of the parties there, not by invitation.

MR. RIORDAN: Well, no one—any officer that comes in my house is against my will if he is going to arrest me.

MR. ABRAMS: Your Honor agrees that is a forced entry as well as breaking the door down.

MR. RIORDAN: I submit that will be our showing.

THE COURT: All right, he submits that will be the showing.

[fol. 120] MR. ABRAMS: Let me see if we have the correlation of time.

MR. RIORDAN: There is a conflict.

THE COURT: Sure.

MR. ABRAMS: As I understand it, Mr. Riordan, what your statement of fact is that—see if we can agree—if I am wrong on this let Mr. Nickoloff correct me.

MR. RIORDAN: Let me say this: I think I can abbreviate it. Mr. Nickoloff received information from Johnny Yee.

MR. ABRAMS: No, no; let's start in with the first, with the entry, starting in at 6:30.

MR. RIORDAN: That's already been ruled on; there is no use going into that.

MR. ABRAMS: No, but I mean, let's go on from there, where they went from there.

MR. RIORDAN: I think by the time of arguing it, I can put my witnesses on faster.

MR. ABRAMS: Maybe it would be better, then.

MR. RIORDAN: Q You received information, you just got through testifying, from James Wah Toy at about 11:00 o'clock in the morning where Wong Sun lived; is that right?

A That is correct.

Q Upon receiving this information what did you do, and what did you ask to be done?

[fol. 121] A Asked that Agent Wong, Alton Wong, take Mr. Toy and have Mr. Toy point out the exact residence of Wong Sun.

MR. RIORDAN: All right, no further questions.

CROSS-EXAMINATION

BY MR. ABRAMS:

Q As I understand what happened in this, Mr. Nickoloff: At 6:30 in the morning of June 4, you and other agents first went to the defendant Toy's premises at 17—

MR. RIORDAN: Just a minute—

MR. ABRAMS: Preliminary.

MR. RIORDAN: I object to that.

MR. ABRAMS: I want to take it that way so we will know—

THE COURT: All right.

MR. ABRAMS: Where they went first and where they went second.

THE COURT: All right; go ahead.

THE WITNESS: We went there approximately 6:30, that's right.

MR. ABRAMS: Q And entered Toy's laundry and residence there, is that right?

A That is right.

Q You had a conversation with Toy there at that time?

A That is correct.

Q Is that right?

[fol. 122] A Yes.

Q As a result of that conversation the defendant Toy mentioned to you the name of Yee, is that right?

A Of Johnny Yee, yes.

Q Johnny Yee, and where he lived?

A That's correct.

Q And then you went to Johnny Yee's house, is that right?

A That is correct.

Q You had a discussion with Johnny Yee there?

A That is correct.

Q Is that right?

A Yes.

Q And Johnny Yee mentioned to you the name of the defendant here, Wong Sun; is that right?

A Not at his residence. He mentioned Wong Sun and James Wah Toy after we brought him to the office of the Bureau of Narcotics.

Q Within an hour or so of that time?

A Within an hour or so; yes, sir.

Q All right. You then questioned Toy again, is that right?

A That's correct.

Q Toy then told you where Wong Sun lived, is that right?

A To the best of his recollection as to the exact address; he didn't know the exact address.

[fol. 123] Q Then you went looking for Wong Sun?

A We had Mr. Toy point out the exact address.

Q You took him with you?

A No, I didn't.

MR. RIORDAN: That isn't the testimony.

THE WITNESS: I didn't take him.

MR. ABRAMS: Q Did some of the other agents take him?

A Another agent.

Q Another agent took him?

A That is right.

Q To point out Wong Sun's place where Wong Sun lived, is that right?

A That's correct.

Q All right. Then you and other agents went to the premises of Wong Sun, is that right?

MR. RIORDAN: Just a minute, don't answer that. I want to make an objection here. This is now cross-examination outside of the scope of the direct. I stopped here.

THE COURT: Right here is where he stopped. He didn't say he ever went to Wong Sun's and that wasn't brought out.

MR. ABRAMS: Didn't he testify he went to 2628 Franklin?

THE COURT: I didn't hear him say so.

THE WITNESS: No, I did not, sir.

THE COURT: He didn't say that. He just stopped right at the point where you are right now.

[fol. 124] MR. ABRAMS: I thought—

THE COURT: He explained how they found out through Toy where Wong Sun lived and pointed out the house, that was the end of his testimony.

MR. ABRAMS: Then there is no necessity for further questions.

THE COURT: That's my point.

MR. ABRAMS: All right.

THE COURT: Nothing more. What else?

MR. RIORDAN: That's all. Mr. Wong, will you take the stand.

THE CLERK: Let the record show that Mr. Alton B. Wong was heretofore sworn in this case.

ALTON B. WONG,

having been previously duly sworn, testified in rebuttal as follows:

DIRECT EXAMINATION

BY MR. RIORDAN:

Q Mr. Wong, a little after eleven o'clock in the morning of June 4th did you go out to 2628 Franklin Street with James Wah Toy?

A Yes, sir.

Q Did James Wah Toy point out the residence of Wong Sun?

A Yes, sir.

Q What did you do; did you go up and ring the doorbell?

[fol. 125] A Well, the first time I want to make sure; we go around the block again and pinpoint again to me, and he done, so many door, so we get the right address.

Q You went up to the door; what did you do at the address 2628 Franklin Street?

A First I rang the doorbell.

Q What happened?

A And the buzzer sounded, the door was open; so I pushed the door open and I asked that lady over there—

Q "That lady," that you referred to now, Mrs. Annie Leong?

A That's right.

Q Where was she?

A She was up on the landing.

Q Up on the landing inside?

A Yes.

Q Then what did you do and what did she do?

A I asked for Mr. Wong.

Q Wong; is that W-o-n-g?

A W-o-n-g.

Q Not L-e-o-n-g?

A No, W-o-n-g.

Q What did she say?

A At this time that another lady show up, was Betty Wong, show up.

Q Another lady showed up; on the landing?

[fol. 126] A No, she was up on the top of the stairs there.

Q You started to come up, is that right?

A That is right. And then at that time I identify myself. That lady over there (indicating), she start turn around and walk back to the kitchen. And then Betty Wong was there and I told her I am from Federal Bureau of Narcotics and Agent Casey at the same time walking up the stairway.

Q Then did you arrest the Defendant Wong Sun?

A Agent Casey did.

Q Whereabouts?

A Well, Betty Wong take agent Casey, he is in a back room sleeping, so Agent Casey went back there and placed the man under arrest.

MR. RIORDAN: No further questions.

CROSS-EXAMINATION

BY MR. ABRAMS:

Q Mr. Wong, you rang the bell at 2628 Franklin Street?

A Yes, sir.

Q The other agents were close at hand, were they?

A They were close; I don't know where they are.

Q Were they within—right downstairs, within a few feet of you?

A A few yards, yes.

Q You say Annie Leong, who just testified, the [fol. 127] sister-in-law of the Defendant Wong Sun, opened the door for you with the buzzer, is that right?

A I didn't know who she was then; I didn't even know her name.

Q But she opened the door for you with the buzzer?
A Yes.
Q A buzzer opened the door?
A Yes.
Q When the door opened could you see her on the stairway.
A Yes, I could see her.
Q You could see her on the stairway?
A Yes.
Q From where you were standing?
A Yes.
Q Were you outside the door or inside the door?
A I was partially in and out.
Q Partially inside the door. You say you asked for Mr. Wong?
A Yes, sir.
Q Could it have sounded like Leong?
A No, sir.
Q No. What did she say, this lady, Annie Leong?
A I don't think she say anything. At that time another woman came out.
Q You saw another woman?
[fol. 128] A She had a bathrobe on; she came out and then I asked her—I told her who I am.
Q Where was this other woman?
A She was also on the stairway then.
Q Right by Annie Leong?
A Right next to her.
Q Right next to her?
A Yes.
Q How was she dressed?
A She was in a bathrobe.
Q A bathrobe. You say you asked her what?
A I told her I am from Federal Bureau of Narcotics and at that time agent Casey say hello to Betty.
Q Said hello?
A Hello, yes.
Q Agent Casey was right with you at the stairs?
A He followed me in, yes.
Q And he said hello?
A Hello Betty.

Q Hello Betty; and then what happened?
A Then we went up: we identified ourselves.
Q Then you went up the stairs—
A Agent Casey asked where was Wong Sun and she told Agent Casey that he is in the back room sleeping.
Q Then what did you do, go in the back room where [fol. 129] he was sleeping?
A I didn't go in, Agent Casey did.
Q Agent Casey went in the back room where he was sleeping. Did other agents go with Agent Casey?
A I don't know.
Q All right. What did you do; just remain there on the stairs?
A No, I came upstairs.
Q Then what did you do?
A I went to the living room.
Q Other agents came up too?
A Yes.
A About six in all?
A I don't recall how many.
Q Approximately six?
A I would say approximately six.
Q Did some of the agents search the premises?
A Yes, sir.
Q Did you see the handcuffs on the defendant Wong Sun?
A I see Mr. Wong brought out from his bedroom; he was handcuffed.
Q Yes.
MR. ABRAMS: That is all.

[fol. 130] REDIRECT EXAMINATION

BY MR. RIORDAN:

Q You said that Agent Casey coming up the stairs behind you said, "Hello, Betty," to Betty Wong, is that right?
A Yes.
Q Agent Casey knew her, didn't he?
MR. ABRAMS: Well, now, that—

THE WITNESS: Yes, sir.

MR. ABRAMS: —that would be hearsay; this man—

THE COURT: It may go out; the answer may go out. I will sustain the objection.

MR. RIORDAN: No questions.

MR. ABRAMS: That's all.

THE COURT: All right.

(Witness excused.)

COLLOQUY BETWEEN COURT AND COUNSEL

MR. RIORDAN: That's the only showing I have why we went in there, Your Honor, the reasons for going in.

THE COURT: All right; let's take a five-minute recess. And that's all, now, is it, on this point?

MR. ABRAMS: On this point, yes.

THE COURT: I now have before me the admission of these statements, is that right?

MR. ABRAMS: Yes.

THE COURT: The offer of these statements?

MR. ABRAMS: Shall I make my objections now?

[fol. 131] THE COURT: Make your objections; make it now.

MR. ABRAMS: So that we understand each other what offer was made, do you recall, Mr. Riordan?

MR. RIORDAN: Yes, Mr. Abrams, the Government offered in evidence Exhibit Nos. 1, 3 and 4.

THE COURT: 3 and 4 it is.

MR. RIORDAN: And the statements of the defendants and the narcotics.

MR. ABRAMS: The statements of each of the—

THE COURT: Each of the defendants.

MR. ABRAMS: Purported statements of each of the defendants, and the narcotics?

MR. RIORDAN: Yes.

MR. ABRAMS: Purported statements of each of the defendants. All right.

Now, we object to the admission of those exhibits marked for identification in evidence, Your Honor. First, as to the two purported statements, they are not statements of either of the defendants; they are not signed by

either of the defendants or acknowledged by either of the defendants to be their statements. They are self-serving, hearsay statements, merely a narrative compiled by one of the federal narcotics agents in his own—by himself, typewritten. They do not constitute admissions or confessions of the defendants.

Furthermore, even assuming they were admissions or [fol. 132] statements or confessions of the defendants; they were procured in a manner and as a result and by means of illegal entries into the private premises and homes of the defendants and in violation of their constitutional rights and after their illegal arrests.

Further, there is no proof of any corpus delecti as to either count of the indictment so as to admit any admissions, confessions or declarations against interest in evidence. Furthermore, even if it were a purported admission or confession or declaration against interest of a defendant it would not be binding upon the other defendant.

As to the narcotics, the same objections that I have made so far as they pertain to the narcotics are made and interposed as to the proposed request to admit the narcotics in evidence. If Your Honor wishes me to further enlarge on the narcotics, Your Honor has my thought, I know, but it may not always be in the record, that the narcotics were procured by the agents and found in the home of one Yee, that the knowledge acquired by the agents as to the presence of those narcotics in the home of Yee was acquired by the agents as the result and the fruit of the agents illegal entry into the private premises and dwelling of the defendant Toy and his illegal arrest and in violation of his constitutional rights, and also the same as to the Defendant Sun Wong, the illegal entry to his home and his illegal arrest and in violation [fol. 133] of his constitutional rights.

THE COURT: All right. Now, let me ask one question here about these statements, what they purport to be. Now, they are not signed statements, that's correct. As I understand, the testimony in reference to them was given by agent William Wong, that they were obtained, dictated and typed and written up, that they were read

to each of the defendants separately in both Chinese and English; they were asked to sign and both of them said, "No," they wouldn't sign them. They were asked if the statements therein were true; they said they were.

Now, I don't know whteher these statements, in written form, can be admitted or not, or should that be presented as part of a conversation or oral admission. Is there a true adoption here of those writings as the statement?

MR. RIORDAN: That is what I believe them to be, Your Honor.

THE COURT: Well, the testimony was that they said they were true.

MR. RIORDAN: They said they were true, but they did not wish to sign them.

THE COURT: All right.

MR. RIORDAN: In one of them, James Wah Toy, he made a correction in his own handwriting; made several corrections.

THE COURT: Let's recess for a few minutes.

[fol. 134] (Short recess.)

THE COURT: Maybe we better have his statement that the evidence is in. Mr. Riordan has rested and the defendants?

MR. ABRAMS: The defendants rest, Your Honor.

THE COURT: All right.

MR. RIORDAN: Both counsel desire time to submit memorandums and briefs to the Court. We ask the matter go over for further hearing and decision to December 4.

MR. ABRAMS: That's agreeable.

THE COURT: That is agreeable with both of you?

MR. ABRAMS: Yes, sir.

THE COURT: And you will have your memos in on—suppose you open on 15 and 15 to close.

MR. ABRAMS: Mr. Riordan said he would open and I would close.

THE COURT: Mr. Riordan will open.

MR. ABRAMS: And he wants to rebut, you can have time; that's all right.

THE COURT: Fifteen and fifteen. Put it on the calendar, Mr. Clerk, for the 4th of December.

THE CLERK: That will be for further hearing?

THE COURT: For further hearing, yes, because we are still on trial.

MR. ABRAMS: I guess the motions are under submission, motions to admit in evidence?

[fol. 135] THE COURT: Yes, but it is still part of the trial.

MR. RIORDAN: For further trial.

THE COURT: It will appear on the calendar for further trial.

(Whereupon, an adjournment was taken until December 4, 1959, as above set forth.)

[fol. 136] FRIDAY, MARCH 15, 1960;

10:00 O'CLOCK A.M.

THE CLERK: United States vs. Wong Sun and James Wah Toy, further trial.

MR. RIORDAN: Ready Your Honor.

THE COURT: Defendants are present?

MR. ABRAMS: Yes, Your Honor.

THE COURT: All right, do you want to discuss this?

MR. RIORDAN: Yes, Your Honor.

At the close of the last meeting, we had the conclusion of the evidence. The Government offered to introduce in evidence three exhibits, narcotics exhibits, and the two statements of the defendants in the matter. That is when the objection was made and Your Honor raised the question of probable cause of the initial arrest of the defendant Wah Toy.

As Your Honor recalls, and as the facts show, after the arrest of Wah Toy, the agents received information from him to the effect that he did not deal in narcotics, but that the evening before he saw it in the hands of James Yee; they went to Yee's house—

THE COURT: They had previously arrested somebody named—

MR. RIORDAN: Hom Way, the informer.

THE COURT: Hom Way. Well, was he the informer? He was under arrest and made a statement.

MR. RIORDAN: He made a statement and with that

[fol. 137] they went and checked it out at 5:30 in the morning six o'clock in the morning.

THE COURT: Yes. It occurred to me it needs more than this, just an ordinary informer that walks in and says, "I can do this and that for you." It all flowed out of the arrest of Hom Way.

MR. RIORDAN: Yes.

THE COURT: And he's the man who quit testifying in the middle of his testimony?

MR. RIORDAN: No, Your Honor, that's another one. That is James Yee.

THE COURT: James Yee, yes, that's right.

MR. RIORDAN: They arrested Hom Way earlier in the evening, after midnight as alleged in the indictment, and he made a statement he had just purchased these narcotics earlier in the evening from the defendant James Wah Toy. With that information, they went to the laundry establishment of James Wah Toy about 6:30 in the morning, knocked on the door, and he opened it and they identified themselves and he slammed the door in the agent's face and went running through the back of the laundry, through the living quarters, over the top of the bed of his wife and children, and the agents broke in the door and pursued him and placed him under arrest.

THE COURT: And now you are offering into evidence —I mean, the offer has been made?

[fol. 138] MR. RIORDAN: The offer has been made, Your Honor.

THE COURT: Mr. Abrams' objections are all complete.

MR. RIORDAN: That is correct, Your Honor.

THE COURT: Is there anything you wish to say?

MR. ABRAMS: Your Honor, I filed a rather complete brief in the matter. I don't want to labor the point beyond necessity for it. I covered every possible facet and point that the government could possibly hope to pin a case on here, and not alone the legality of the arrest, but also the sufficiency of the evidence to sustain a conviction. Assuming the arrest in these cases was with sufficient probable cause, they still couldn't under any possible theory make out a case against the defendants, simply the finding of some narcotics in a third person's place.

Without any further evidence—their witness apparently failed them and the government has tried to make a case simply out of the finding of what was left in the findings of narcotics in the premises of a third party.

I have pointed out in my brief five or six or seven different lines of reasoning, supported by ample authority, to indicate that the case can't possibly stand on such evidence as that. The government simply doesn't have a case. There is no evidence, aside from the legality of the arrest of the defendants.

THE COURT: Well, there is this, I mean, that these [fol. 139] statements—Do you have the statements?

THE CLERK: Yes, Your Honor.

MR. ABRAMS: If the statements were a complete confession, they still couldn't be sufficient to sustain a conviction in the absence of independent evidence. The government doesn't have it.

THE COURT: Well, what about this evidence, Mr. Riordan?

MR. RIORDAN: It is the theory of the government's case, Your Honor, that the contraband itself is a corpus delecti of the crime. And though the admissions of the defendants do nothing more than connect the defendants with the crime, to wit, the unlawful concealment of the heroin, the corpus of the crime, as we showed in the Smith case can be proven without idenfifying the defendant who committed the crime. And the Offert (sic) and the Smith case both hold that the element of the corpus is not the identification of the culprit.

THE COURT: Well, I think what you have got here, the indictment charges conspiracy—

MR. RIORDAN: In the substantive count.

THE COURT: —and the transportation and concealment in the substantive count.

Well, you have got the entire transaction right through here, Mr. Abrams, showing, independently of these statements—I think, as I said once before during the course of the trial, as I recall, as I read this, the contraband [fol. 140] itself is before us to show where it was and what was being done with it. As far as the corpus of the crime is concerned, I think it has been proven here.

MR. ABRAMS: Well, Landry and other cases hold that isn't the corpus.

THE COURT: They hold that the actual concealment was the corpus.

MR. ABRAMS: Not in the absence of showing by independent evidence the concealment or possession by the defendants themselves. Here you have possession in a third person. Landry and other cases hold that possession by a third person is not proof of a corpus delecti.

THE COURT: You have a charge here of conspiracy to conceal—

MR. ABRAMS: What is that, Your Honor?

THE COURT: You have a charge here of conspiracy —conspiracy to do this very thing. One of the conspirators can certainly carry out the object to that extent, of the conspiracy, and therefore the corpus is proved.

In Landry, there was a discussion concerning transportation. I don't recall the discussion, whether it had a conspiracy involved or not.

MR. ABRAMS: I don't recall. Well, the reference there wouldn't be to a conspiracy; it would be to a substantive count of concealment, or—

[fol. 141] THE COURT: That is right; that is what that reference was. Here the charge is that these two men together with John Yee did conspire to conceal. I think it is a rather different situation to that extent.

Well, I will admit the evidence.

MR. RIORDAN: For the record, that will be exhibits No. 1, 3 and 4, and a ruling of the Court that No. 2 is not admissible.

MR. ABRAMS: What is No. 2?

MR. RIORDAN: That is the statement of Johnny Yee, which is not admissible.

(Plaintiff's Exhibits 1, 3 and 4 for identification received in evidence.)

MR. RIORDAN: And the Court makes a specific ruling that Exhibit No. 2 is not admissible in evidence and will not be considered by the Court?

THE COURT: That is right. I didn't know of its existence, even.

Do you want to argue it further?

MR. ABRAMS: No, I don't see any necessity of arguing it further. Your Honor has ruled on the important elements of the case. The case is closed.

THE COURT: All right. I will limit my findings to the first count. I will find the defendants guilty of conspiracy. I think this evidence does not go to prove the [fol. 142] substantive offense as charged.

MR. RIORDAN: I would like to address myself to the Court on that. As you can see, the government sets forth in its closing brief that we had some doubts as to the conspiracy. We thought that the substantive count was the stronger, in which we would meet with no error.

Did you look at the closing paragraph, Your Honor?

THE COURT: I did last night.

MR. ABRAMS: I think the Government is vulnerable on both counts.

MR. RIORDAN: The Government would rather stand on the substantive count.

MR. ABRAMS: Perhaps counsel should stand on both counts and give counsel a chance to take an appeal on both counts.

MR. RIORDAN: You see our reasoning, if the conspiracy in itself is an agreement and that's the corpus, I had some doubts after talking it over with my colleagues, whether we had independent evidence of this agreement, and the answer is that we are doubtful; we have to go to the statement, extra-judicial admissions, although we have the heroin, whereas in the concealment and the transportation, let me point out that the concealment is the corpus of the crime. We have a narcotic drug. It is undisputed. We have the concealment, the possession of the same, and that is the corpus. The extra-judicial statements are only those statements made by the [fol. 143] defendants connecting themselves to the crime.

That was the reasoning we took last night in the office.

In other words, the proving of a corpus independent of any statements made by the defendants in connection with the conspiracy count involving the same transaction brings into play another element, to wit, the unlawful agreement, whereas in the substantive count we do not have that. That element is left out. I mean the requirement of the government to meet that element is no longer present in the substantive count. You see that in the last paragraph.

I wanted to call Your Honor's attention to that.

THE COURT: Yes. Well, I will set aside my finding on the first count and mark the matter submitted. Put it down for submission.

I am going to ask you to come out once more. I want to go through the cases again. I thought I had them in mind, but I haven't. It has been a little time.

What is a convenient day? About a week from today, something like that?

(Discussion off the record)

MR. RIORDAN: Also, Your Honor, may it be deemed that Exhibits 3 and 4 have been read into the record? I don't know whether it is necessary.

MR. ABRAMS: They are in evidence.

THE COURT: Oh, sure, let them be deemed read. All right, April 1st at ten o'clock for submission.

[fol. 144] FRIDAY, APRIL 1, 1960;

10:00 O'CLOCK, A.M.

THE CLERK: United States vs. Wong Sun and James Wah Toy, further trial.

MR. ABRAMS: Your Honor was correct. I didn't know the matter was to be continued, but our bail will probably have to be continued.

THE COURT: So I was told.

MR. ABRAMS: I understand one of the defendants—I am advised—was in the hospital. I don't know the circumstances. I will have to find out. Perhaps this matter ought to stand over a week until I can get him out of there. That will be the 8th. I suppose he won't be out much sooner than that.

THE CLERK: April 8th.

MR. ABRAMS: At ten o'clock?

THE CLERK: Yes. Which defendant is this?

MR. ABRAMS: This is Wong Sun. It is Toy that is absent.

THE COURT: All right.

[fol. 145] FRIDAY, APRIL 8, 1960;

10:00 O'CLOCK A.M.

THE CLERK: United States of America vs. Wong Sun and James Wah Toy, further trial.

MR. RIORDAN: Ready, Your Honor.

MR. ABRAMS: Ready, Your Honor.

Your Honor, I just want to check that the record is clear on a couple of matters, if I may do so.

THE COURT: First, let the record show that both the defendants are present this morning.

MR. ABRAMS: Yes, they are both here.

I have been at a disadvantage in bringing these matters to your attention sooner because I had to make use of Your Honor's copy of the transcript at odd times, and haven't had it when I wanted it.

THE COURT: I am sorry if I kept it from you.

MR. ABRAMS: That's all right. I think I have had the use of it more than Your Honor.

May the record indicate, Your Honor, if it does not, if it doesn't already do so, and I believe it probably does, that the testimony of agent Wong, beginning at approximately 60 of the transcript, and the testimony of agent Nickoloff, appearing at approximately or beginning at approximately Page 115 of the transcript, which testimony deals with information acquired by the the agents [fol. 146] from other persons than the defendants was admitted on voir dire solely for the purpose of showing if there was probable cause for the arrest of the defendants and not as evidence on the merits of the case. I think that was, naturally, the intention of allowing that evidence, that hearsay evidence in, and I think the record is fairly clear on that; but may the record record indicate definitely that is such?

THE COURT: Well, I am not familiar with exactly at this time what is in the record. Whatever the record shows, is the record of the case. It has all been transcribed and done in open court and there is nothing before the Court that isn't in that record. Whatever that record shows, is the fact. That is all I can say.

Do you have any different recollections, Mr. Riordan?

MR. RIORDAN: No, Your Honor.

MR. ABRAMS: Do you have any objection to that, that the record so indicates?

MR. RIORDAN: The record is the record.

MR. ABRAMS? You wouldn't want that evidence admitted for any other purpose?

MR. RIORDAN: The record is the record.

THE COURT: Whatever it indicates as the record is the record.

Is there anything further this morning?

MR. ABRAMS. Yes, Your Honor. May I just speak [fol. 147] for another few minutes, Your Honor, on the questions proposed to Your Honor? I hope I am not holding up some other proceeding Your Honor has this morning. I would like about five or ten minutes to call Your Honor's attention to a couple of matters here.

THE COURT: All right.

MR. ABRAMS: The Government in its reply brief, Your Honor, more or less, and I think in argument with Your Honor previously a couple of weeks ago more or less conceded that the evidence as insufficient insofar as the first count of conspiracy is concerned; and I think asked Your Honor if Your Honor was going to make any ruling favorable to the Government that Your Honor indicate such a ruling as to the second count, the concealment and transportation, rather than the first count of conspiracy which they didn't have any faith in or little faith in.

Now, as to the second count of the indictment, the concealment or transportation, Your Honor, I think their position definitely is just as bad in that connection. Beginning on Page 18—withdraw that. In the short memorandum the Government filed in reply, the Government starts off in the beginning, or first page of its memo-

randum, by conceding that extrajudicial admissions alone cannot support a conviction.

THE COURT: That's right.

MR. ABRAMS: And, further, there must be substantial [fol. 148] corroborative evidence in addition thereto, citing the well-known cases of Smith vs. the United States and other cases. Then they go on to summarize what they believe— they go on to summarize what they contend is the substantial independent evidence to corroborate the admissions.

At the bottom of—if Your Honor has there—the last paragraph on Page 2:

> "Applied to the facts of the instant case, we believe that there is substantial corroborative evidence to admit the extrajudicial admission of each defendant that such admissions along with the corroborative evidence permits the trier of the fact to draw the inference . . ."

And so forth, as to the second count. Then he goes on, on the next page, on top, he summarizes it. He says:

> "Defendant Wah Toy informed agent Nickoloff that one 'Johnny' had a 'piece' of heroin (that is, approximately one ounce). Wah Toy exhibited familiarity with Johnny's residence, both as to the location, and the description of the premises."

If anything, that is not independent substantial—substantial independent evidence. It is not evidence at all. That is part, if anything, of the admissions of the defendants.

Then he goes on in a paragraph or two there and generalizes his own—well, beyond that:

[fol. 149] "The agents then proceeded to Johnny's premises and Johnny gave them the heroin, approximately one ounce.

"These facts establish that a crime had been committed."

Then he goes on theorizing in the next paragraph or two. Then he ends up by saying:

"This is sufficient corroboration to admit the extrajudicial confessions."

So it all boils then down to the fact that all the Government has and is relying on for substantial independent evidence to corroborate the admissions is the finding of narcotics in the third person's premises, Yee's house, the finding of the heroin there.

Now, that is not independent—that is not sufficient to corroborate the admissions of a defendant. The cases of Landry and all the other cases, many recent United States cases hold that. I cited those in my brief in detail and quoted from these cases, beginning Page 18 of--yes, beginning on Page 18 of my memorandum. I cited the Landry case, the Frank case, the Harris case, the Roviaro case, the Martin case, the Goff case, and the Naftsger case, where are definitely in point, and on this very point in this case and are decisive.

Now, Mr. Riordan's answer attempts to answer the Landry case by saying—in his memorandum, he says on Page 3:

[fol. 150] "But Landry is inapposite because there the issue was whether the Government had sufficiently established possession in the defendant to bring into play the presumptive clause of Section 174. There was no issue there as to the sufficiency of the corroborative evidence to lay a foundation for the admission of extrajudicial admissions, which is the problem in the instant case."

Well, I don't know how you can read that Landry case and come to that conclusion. That is the very point in the Landry case. The court said in that case, in part, as I pointed out in my brief on Page 19—the Government there in the Landry case advanced the argument, supported by cases, that the admission of a crime is sufficient to support a conviction if it is corroborated by independent evidence of the corpus delicti.

The very point involved in this case!

The court saw no point in this argument, and observed that "possession of a narcotic is not an offense. The

statutory presumption which arises from unexplained possession is only a rule of evidence."

In that Landry case, Landry admitted the ownership and possession of the narcotics they found in the presence of this woman Dolores; they had the direct admission from him. But they did not have the possession in Landry as in this particular case—the possession was in the third [fol. 151] person. Identical facts. We are losing sight, Your Honor, of these presumptions under the law and our federal statute which is different than the state statute.

Section 174 of the U. S. Code, the Jones-Miller Act, says if any person fraudulently or knowingly brings any narcotic drug into the United States contrary to law or assists in doing the transporting or concealment and so forth is guilty. And then there is that presumption that whenever he is found in the possession of the drugs, unexplained possession, the burden shifts to him and the unexplained possession is sufficient for the Government's proof of this required presumption here that it was imported into the United States and knowingly by the defendant. The unexplained possession in the defendant supplies that evidence.

You don't have unexplained possession in the defendant. You have possession in the third person, and that does not satisfy the proof required of the statutory presumptions as the presumption in Section 174, as they point out in the Landry case. Therein the court further held that the proof of possession by one person is not established when the undisputed direct proof places the possession in some other person.

And in referring to the statutory presumptions arising from proven possession of narcotics, the court said:

> "If Congress had intended that a presumption arised against the owner as well as the possessor of [fol. 152] a narcotic, it would have so declared."

The Government in that case advance the novel idea that ownership of narcotics is proof of their possession, as the Government is trying to do in this case, and the court explained—it wouldn't accept the novel theory, and said:

> "The provision which raises a presumption of guilt from the fact of unexplained possession and thereby in effect shifts the burden of proof to a defendant, is drastic, no doubt designed to meet a menacing situation. Congress has created a presumption upon proof of the existence of a fact, and now the Government would have the court presume the fact."

And the court then concluded that:

> "In our judgment the record is devoid of proof that Landry had possession."

Therefore there was no basis for the conviction.

The Jackson case is similar. The Harris case is similar. The Roviaro case is similar on that point. They have never been overruled, to my knowledge; I have never found any cases overrule them. They seem to be the law. The Frank, the same way.

The Government simply has no evidence in this case at all, Your Honor, to base a conviction on either of the two counts. They merely have what they believe to be admissions of the defendant; in addition, the finding of [fol. 153] some narcotics in a third person's house. The Government is relying upon the finding of narcotics in the third person's house to constitute for them the substantial independent evidence that is required; and it isn't.

If that possession was found in the defendant, it would be a different situation. But that isn't the case here. The facts in this case are identical with the facts in the Landry case and in these other cases cited. I don't know how the Government can get away from that situation. I think it boils down to the fact that the Government had a witness who failed them and in whom they had hopes to prove their case, and they are just trying to sustain a conviction on what they have left, which is not enough.

THE COURT: Let's hear from Mr. Riordan.

I think Mr. Abrams analysis in the Landry case is very sound, Mr. Riordan. I would like to hear from you.

MR. RIORDAN: The Landry case, Your Honor, has not place in this. The Landry case was a question of proving possession, but here we have possession, conceal-

ment, and transportation in the case. The facts of our case are completely different from the Landry case.

What are the facts? Let's look. We have the exhibit in evidence, the narcotic drugs. How did we come about fetching the narcotic drugs? We go to what is Wah Toy's laundry and there he pulls that running gag and [fol. 154] they go in there and they arrest him and after talking with him, he says, "No, I don't deal." He denies any dealings in narcotic drugs at all when they accuse him of the information that the agents had.

But he says, "I know a fellow who does deal; I saw him last night out at Johnny Yee's house."

He furnishes the address, where the house was and everything like that, and the agents with that information then go to the house.

Now, they are not using any confessions right now. This is done right while the crime is being committed. They go out to Johnny Yee's house, and this is independent evidence, and the narcotic drugs are surrendered by Yee. They ask him, "Where did you get it?" He says, that he got it from the third defendant here—the second defendant on trial—that's known as Sea Dog.

Johnny Yee takes them to the house of Sea Dog because he didn't even know the address. So they go to Sea Dog and—So then the agent arrests them on the information of Johnny Yee.

Now they got the narcotic drug; they sit down to talk to both of them. Both of them admit they took it out to Johnny Yee's house the night before—the day before—and transported it. So they aided and abetted in not only the transportaion and the concealment of the drugs. [fol. 155] Now, the Landry case is something different; it is complete denial of association of Landry with the drugs belonging to the woman.

MR. ABRAMS: Johnny Yee, what he said, wouldn't be binding upon the defendants; it would be hearsay as to them.

MR. RIORDAN: Not his actions, though. By getting in agent's car and driving down to Sea Dog's house because he didn't know the address—

MR. ABRAMS: They wouldn't be bound by that action either on the substantive count.

MR. RIORDAN: Sure they would.

THE COURT: Well, the whole problem here is, you have the narcotics and you have the statements of all three, you have these extrajudicial statements made later that are in evidence.

MR. RIORDAN: But it was the original statements in the laundry at the time of the apprehension of Toy in which he describes in detail to the agent where the narcotics can be found and where they are. The agent's testimony is that they were right where Toy told them they would be and produced them. And then they went down to the other house, after having been told that Sea Dog will produce the narcotics—in other words, you have here the aiding and abetting. Without their cooperation in this case, the drugs would not have been found in Johnny Yee's home. The crime is the concealment and [fol. 156] the transportation. Now, we found the drugs concealed. Now that is a crime, the concealment is a crime.

Now, you have got to find the defendant. And the admissions of these defendants that they committed the crime or identified themselves to the commission of the crime is not the corpus delicti is the drugs concealed in a home. Now, to identify the defendant who committed the crime is not part of the corpus delicti, and they admitted they did it. They identified themselves with the crime.

MR. ABRAMS: You are still trying to prove the crime by the admissions of the so-called—

MR. RIORDAN: That's correct; the crime is the corpus, the concealment of the drugs.

MR. ABRAMS: I know that.

MR. RIORDAN: We showed that. Now we tried to identify the defendants with it. We can do it by their own admissions if they want to identify themselves as the perpetrators of the crime.

MR. ABRAMS: No. The cases hold you can't. The Landry case—that's the very point in the Landry case.

MR. RIORDAN: The Landry case is a different set of facts.

MR. ABRAMS: The facts are identical.

THE COURT: There was an actual question of possession. Landry's statement was the only thing in ref-
[fol. 157] erence to Landry whatsoever. You had no testimony, as I recall.

MR. ABRAMS: He was right there in the apartment with the girl. He was right there in the apartment with the girl, but they found the narcotics in her part of the apartment or something, and he said, "They're mine. I own those narcotics; they are my narcotics." He was right there. I think he occupied the apartment with her, too.

THE COURT: No, I don't think so. I don't think the statement was that broad.

MR. ABRAMS: I may be wrong, but I think he did. I don't know that it is too important.

THE COURT: I don't think so.

MR. ABRAMS: The court held the facts in that case showed the direct possession in the girl, not in Landry; that the admission of Landry that they were his narcotics was not sufficient.

THE COURT: Here you simply have admissions of these people that they did—

MR. ABRAMS: This is even worse. Here the narcotics are found far away in a third person's house.

THE COURT: One of them, his admission was, "I took it out there."

MR. ABRAMS: That is his admission. Here's Landry's admission that they are his, and he is right there.

MR. RIORDAN: Here's the thing, Your Honor. We
[fol. 158] wouldn't have found those drugs except that Mr. Toy helped us to. He denied he committed any crime, but he tipped us off, "You will find drugs in a certain place."

Now, that is all independent. These aren't the admissions of guilt at this time. So we go there and we find something. Johnny Yee then brings an agent to identify the third defendant in this case and he brings him down to the defendant's home. So we get all three of them in there, and the drugs. Now, we have a crime committed. And they admit, "We did the crime." They identify themselves with the commission of the crime.

MR. ABRAMS: The apartment was occupied by Dolores, Landry and others, and he was there—

THE COURT: All right—all right—

MR. ABRAMS: That's even stronger.

MR. RIORDAN: That's the reason we didn't want to rely upon, and we wanted to bring to the Court's attention—we didn't have too much faith in the conspiracy account because there is an element of the crime that must be proved without the confession, to wit, the agreement—and we didn't want to place too much reliance on that.

THE COURT: I think you're right.

ORAL FINDING OF COURT

I am ready to rule on the matter and I will find the defendants guilty on the second count.

The conspiracy count—

[fol. 159] MR. RIORDAN: Judgment of acquittal on the conspiracy count?

THE COURT: Yes, the first count.

MR. ABRAMS: May the record indicate, Your Honor—I meant to interpose a motion for acquittal for both defendants before Your Honor ruled—may the record indicate that I have made a motion for acquittal as to both defendants?

THE COURT: Certainly. Yes, my order was made subsequent to your motion, and it was denied.

MR. ABRAMS: Your Honor apparently has granted the motion on the first count?

THE COURT: Yes.

MR. ABRAMS: And denied it as to the second count and found the defendants guilty on the second count?

THE COURT: Right. That is a correct statement.

MR. ABRAMS: Strictly conforming with the rule, it should be motion for judgment of acquittal.

THE COURT: It is the same. Actually, I think the record shows you already made that. That is what we have been arguing about this morning, on that motion.

MR. ABRAMS: Your Honor, at this time, under the rules, I want to interpose for the defendants a motion for a new trial on all the statutory grounds and on all

the grounds heretofore urged during my various objections during the course of the trial. More specifically, [fol. 160] that the prosection's exhibits 1, 3 and 4, offered in evidence were admitted in evidence over the objections of the defense, and the Court erred in so doing; that the Court erred in denying the defendants' motion for a judgment of acquittal.

Would Your Honor want to rule on that now?

THE COURT: Yes, if you made it. Have you finished stating it?

MR. ABRAMS: Yes.

THE COURT: That will be denied.

Let's refer to the probation office for pre-sentence report.

MR. ABRAMS: All right.

THE COURT: April 29th for sentence, at ten o'clock, a.m.

MR. ABRAMS: May they remain on their present bail, Your Honor?

I will be frank with Your Honor and say that I will file a notice of appeal on this case, and I think the point is sufficiently controversial to warrant an appeal on this case, in good faith. I am going to ask bail be set on the appeal, so that I see no particular danger in allowing the defendants to remain on their bail at the present time.

THE COURT: It is an automatic minimum sentence. What do you know about these defendants? I have no information about these people.

MR. ABRAMS: I think one of them has a prior.

[fol. 161] MR. RIORDAN: One of them has a prior, Your Honor.

MR. ABRAMS: Wong Sun has a prior conviction. Minimum sentence, compulsory, ten years.

I won't interfere with Your Honor's ruling in this matter.

THE COURT: Let's let them go in and proceed with the usual procedure on appeal. I think it better they both go into custody.

(Whereupon an adjournment was taken until Friday, April 29th, at ten o'clock a.m.)

[fol. 162] FRIDAY, APRIL 29, 1960;

10:00 O'CLOCK, A.M.

(LAURENCE E. DAYTON, ESQ., appeared as counsel on behalf of the plaintiff, in lieu of JOHN RIORDAN, ESQ.)

MR. DAYTON: We would like to file an information charging Wong Sun with a prior conviction under the Jones-Miller Act and ask that he be arraigned.

THE CLERK: Is the defendant Wong Sun present?

MR. ABRAMS: Yes.

(Thereupon, the information was read to the defendant.)

THE CLERK: Is the Wong Sung named in the information your true name?

THE DEFENDANT: Yes.

THE COURT: Is there anything else?

MR. ABRAMS: I have some slight recollection of Judge Levine holding in a state case, a state court proceeding some while back, that the filing of an information at this late date was improper, and I think Judge Levine rejected the filing or disallowed the filing of the information charging the prior, but I haven't checked the federal rule on the matter.

MR. DAYTON: I understood it could be filed at any time prior to the sentence.

THE COURT: I think that is the rule.

MR. ABRAMS: I still think this is a case where I should ask Your Honor to reconsider the motion for new [fol. 163] trial and press my point on the second count in which Your Honor denied my motion for acquittal. However, I presume Your Honor feels that the matter should stand as it is and I shan't press Your Honor any further about it.

THE COURT: No, I think it should stand. I think it should stand. Do we take a plea on this information?

MR. ABRAMS: No, it is admitted and leaves the defendant in the position of having a prior conviction. He has already admitted it.

THE COURT: Yes, he has admitted the conviction at the trial.

MR. ABRAMS: And he admitted it now.

THE COURT: I guess nothing is left but to pass sentence. All right, James Wahy Toy—

MR. ABRAMS: He has no prior conviction, but he is subject to the five-year minimum.

THE COURT: Such will be the order in the case, five years.

Wong Sun has a prior conviction, so ten years is the only thing I can do.

MR. ABRAMS: Yes, Your Honor. I have explained that that is all that Your Honor can do under the rule. I will serve oral notice of appeal at this time and will file a formal order later today.

[fol. 164]

IN UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SOUTHERN DIVISION

[Title omitted]

ORDER GRANTING MOTION OF ACQUITTAL ON COUNT I AND FINDING DEFENDANTS GUILTY AS TO COUNT II—
April 8, 1960

This case came on this day for further hearing. John H. Riordan, Jr., Esq., Assistant United States Attorney, was present on behalf of the United States. The defendants were present on bond and with their attorney, Sol Abrams, Esq.

After arguments by respective counsel, ORDERED that the defendants' motion for judgment of acquittal is GRANTED *as to* COUNT ONE, and DENIED *as to* COUNT TWO of indictment. ORDERED that the defendants, and each of them is hereby found GUILTY of the offense as charged in COUNT TWO of indictment.

ORDERED case referred to the Probation Officer of this Court for investigation and report.

ORDERED case continued to April 29, 1960, for sentence.

[fol. 165]

IN UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SOUTHERN DIVISION

[Title omitted]

JUDGMENT AND SENTENCES—April 29, 1960

This case came on this day for sentence. Lawrence Dayton, Esq., Assistant United States Attorney, was present on behalf of the United States. The defendants were present in the custody of the United States Marshal and with their attorney, Sol Abrams, Esq. Robert Carter, Probation Officer, was present.

The Government filed an INFORMATION on identity as to Wong Sun. The defendant was duly arraigned on the Information, and the defendant Wong Sun admitted being the person described in the Information on identity.

The defendants were called for judgment, and the Court having asked each defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court.

IT IS ADJUDGED that each defendant is guilty as charged in COUNT Two of indictment.

IT IS ADJUDGED that the defendant JAMES WAH TOY is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of FIVE (5) YEARS on COUNT Two of indictment.

IT IS ADJUDGED that the defendant WONG SUN is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for [fol. 166] a period of TEN (10) YEARS on COUNT Two of indictment.

ORDERED that judgments be entered herein accordingly.

ORDERED that the defendants be remanded to the custody of the United States Marshal.

[fol. 167]

IN UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SOUTHERN DIVISION

No. 36819

UNITED STATES OF AMERICA

v.

WONG SUN

JUDGMENT AND COMMITMENT—April 29, 1960

On this 29th day of April, 1960 came the attorney for the government and the defendant appeared in person and [1] with counsel.

IT IS ADJUDGED that the defendant has been convicted upon his plea of [2] NOT GUILTY and a FINDING of GUILTY after Trial by Court of the offense of Violation of Title 21 U.S.C. § 174, Concealing and Transporting a narcotic drug, heroin, In that on or about June 1, 1959, in the City & County of San Francisco, State and Northern District of California, the defendants did fraudulently and knowingly conceal and transport a narcotic drug, to wit, heroin. as charged [3] in COUNT (2) Two of Indictment. and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

IT IS ADJUDGED that the defendant is guilty as charged and convicted.

IT IS ADJUDGED that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of [4] TEN (10) YEARS.

IT IS ADJUDGED that [5] Defendant's Motion for JUDGMENT of ACQUITTAL as to COUNT (1). ONE OF INDICTMENT IS GRANTED.)

It Is Ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

Albert C. Wollenberg
United States District Judge

Examined by: Lawrence Dayton
Asst. U.S. Atty

C. W. Calbreath
Clerk

By: F. R. Pettigrew
Deputy Clerk

The Court recommends commitment to:

Judgment & Commitment Filed This 29th Day of April, 1960

[fol. 168]

IN UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SOUTHERN DIVISION

No. 36819

UNITED STATES OF AMERICA

v.

JAMES WAH TOY

JUDGMENT AND COMMITMENT—April 29, 1960

On this 29th day of April, 1960 came the attorney for the government and the defendant appeared in person and [1] with counsel.

IT IS ADJUDGED that the defendant has been convicted upon his plea of [2] NOT GUILTY and a FINDING of GUILTY after Trial by Court of the offense of Violation of Title 21 U.S.C. § 174, Concealing and Transporting a narcotic drug, heroin, In that on or about June 1, 1959, in the City & County of San Francisco, State and Northern District of California, the defendants did fraudulently and knowingly conceal and transport a narcotic drug, to wit, heroin. as charged [3] in COUNT (2) Two of Indictment. and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

IT IS ADJUDGED that the defendant is guilty as charged and convicted.

IT IS ADJUDGED that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of [4] FIVE (5) YEARS.

IT IS ADJUDGED that [5] Defendant's Motion for JUDGMENT of ACQUITTAL as to COUNT (1) ONE OF INDICTMENT IS GRANTED.)

It Is Ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

Albert C. Wollenberg
United States District Judge

Examined by: Lawrence Dayton
Asst. U.S. Atty

C. W. Calbreath
Clerk

By: F. R. Pettigrew
Deputy Clerk

The Court recommends commitment to:

Judgment & Commitment Filed This 29th Day of April, 1960

[fol. 169] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SOUTHERN DIVISION

[Title omitted]

PETITION TO APPEAL IN FORMA PAUPERIS (28 USC 1915)—
Filed April 29, 1960

Wong Sun and James Wah Toy, the defendants above named, appearing by counsel, petition the court for permission to appeal to the United States Court of Appeals for the Ninth Circuit from the conviction and judgment herein, in forma pauperis, for the reasons set forth in the attached affidavits.

/s/ Sol A. Abrams
Attorney for Defendants

April 29, 1960

[fol. 170] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SOUTHERN DIVISION

[Title omitted]

AFFIDAVIT IN SUPPORT OF PETITION TO APPEAL IN FORMA PAUPERIS—Filed April 29, 1960

STATE OF CALIFORNIA)
City and County of San Francisco) SS

WONG SUN, being first duly sworn, says:

I am a citizen of the United States of America.

I am a defendant in the above entitled action; that I am charged in the indictment therein in the first count

with conspiracy to conceal and transport narcotics in violation of Title 21 U.S.C. Section 174, and in the second count with concealment and transportation of narcotics in violation of Title 21 U.S.C. Section 174.

I waived trial by jury, and after a trial by the Court the Court granted my motion for a judgment of acquittal on the first count of the indictment, but denied such a motion and adjudged me guilty on the second count of the indictment, and thereupon imposed a sentence upon me.

I duly filed my Notice of Appeal from said conviction and judgment and desire to continue my appeal to the United States Court of Appeals for the Ninth Circuit.

My appeal is taken for the purpose of seeking a [fol. 171] reversal of said conviction and judgment because of insufficient evidence to sustain said conviction and judgment and errors in law occurring during the trial resulting in the denial of a fair trial to me.

I believe I am entitled to redress sought to be obtained by this appeal.

Because of my poverty I am unable to pay the fees and costs of an appeal, or give security therefor.

/s/ Wong Sun

Subscribed and sworn to before me this 29th day of April, 1960.

[SEAL] /s/ J. P. Walsh.

DEPUTY CLERK U. S. DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

[fol. 172] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SOUTHERN DIVISION

[Title omitted]

AFFIDAVIT IN SUPPORT OF PETITION TO APPEAL IN FORMA PAUPERIS—Filed April 29, 1960

STATE OF CALIFORNIA)
City and County of San Francisco) SS

JAMES WAH TOY, being first duly sworn, says:

I am a citizen of the United States of America.

I am a defendant in the above entitled action; that I am charged in the indictment therein in the first count with conspiracy to conceal and transport narcotics in violation of Title 21 U.S.C. Section 174, and in the second count with concealment and transportation of narcotics in violation of Title 21 U.S.C. Section 174.

I waived trial by jury, and after a trial by the Court the Court granted my motion for a judgment of acquittal on the first count of the indictment, but denied such a motion and adjudged me guilty on the second count of the indictment, and thereupon imposed a sentence upon me.

I duly filed my Notice of Appeal from said conviction and judgment and desire to continue my appeal to the United States Court of Appeals for the Ninth Circuit.

My appeal is taken for the purpose of seeking a [fol. 173] reversal of said conviction and judgment because of insufficient evidence to sustain said conviction and judgment and errors in law occuring during the trial resulting in the denial of a fair trial to me.

I believe I am entitled to redress sought to be obtained by this appeal.

Because of my poverty I am unable to pay the fees and costs of an appeal, or give security therefor.

/s/ James Wah Toy

Subscribed and sworn to before me this 29th day of April, 1960.

[SEAL] /s/ J. P. Walsh

DEPUTY CLERK U.S. DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

[fol. 174] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SOUTHERN DIVISION

[Title omitted]

ORDER GRANTING LEAVE TO APPEAL IN FORMA PAUPERIS
(28 U.S.C. 1915)—April 29, 1960

Upon the petition of Wong Sun and James Wah Toy, the above named defendants, to appeal to the United States Court of Appeals for the Ninth Circuit from the conviction and judgment herein, in forma pauperis, and good cause appearing therefor,

IT IS HEREBY ORDERED that said defendants be and they are hereby allowed to prosecute their appeal in the above entitled cause to the United States Court of Appeals for the Ninth Circuit in forma pauperis without prepayment of fees and costs or security therefor.

Dated: April 29, 1960.

/s/ Albert C. Wollenberg
United States District Judge

[fol. 175] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SOUTHERN DIVISION

[Title omitted]

NOTICE OF APPEAL—Filed April 29, 1960

Names and addresses of Appellants: Wong Sun and James Wah Toy, County Jail, City and County of San Francisco, State of California.

Name and address of Appellants' Attorney: Sol. A. Abrams, 400 Montgomery Street, San Francisco 4, California.

Offense: Second Count, a violation of Jones-Miller Act, 21 USC 174.

That on or about June 1, 1959, in the City and County of San Francisco, Northern District of California, the defendants did fraudulently and knowingly receive, conceal, transport and facilitate the transportation and concealment of a narcotic, to wit, heroin, then and there knowing the same to have been transported and brought into the United States contrary to law.

Date of Judgment: April 8, 1960.

Description of Judgment: Defendants adjudged guilty upon second count of the indictment as above set forth.

Date of Sentence: April 29, 1960.

Sentence: Defendant Wong Sun: ten years imprisonment. Defendant James Wah Toy: five years imprisonment.

Name of Jail where now confined: County Jail of the [fol. 176] City and County of San Francisco, State of California.

We, the above named appellants, hereby appeal to the United States Circuit Court of Appeals for the Ninth Circuit, from the judgments above stated.

Dated: April 29, 1960.

/s/ Sol A. Abrams
Attorney for Appellants

[fol. 177] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SOUTHERN DIVISION

[Title omitted]

DESIGNATION OF CLERK'S TRANSCRIPT ON APPEAL—
Filed May 4, 1960

To the Clerk of the United States District Court for the Northern District of California:

Appellants Wong Sun and James Wah Toy, designate the following as being required by them to constitute the Clerk's transcript on appeal:

The entire record, including exhibits.

Dated: May 3, 1960.

/s/ Sol A. Abrams
Attorney for defendants and appellants

[fol. 178] Clerk's Certificate to foregoing transcript omitted in printing

[fol. 179]

IN UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

• • • • •

Before: Hamley, Hamlin and Koelsch, Circuit Judges

MINUTE ENTRY OF ORDER OF ARGUMENT AND SUBMISSION—Dec. 16, 1960

This cause coming on regularly for hearing and submission, Mr. Sol A. Abrams, argued for the appellant and Mr. John Kaplan, Assistant United States Attorney, argued for the appellee and thereupon, the court ordered this cause submitted for consideration and decision.

[fol. 180]

IN UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

• • • • •

Before: Hamley, Hamlin and Koelsch, Circuit Judges

ORDER DIRECTING FILING OF OPINIONS AND FILING AND RECORDING OF JUDGMENT—March 10, 1961

ORDERED that the typewritten opinions and dissenting opinion rendered by this Court in above cause be forthwith filed by the clerk and that a judgment be filed and recorded in the minutes of this court in accordance with the majority opinion rendered.

[fol. 181]

IN UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 16,950

WONG SUN and JAMES WAH TOY, APPELLANTS

vs.

UNITED STATES OF AMERICA, APPELLEE

Appeal from the United States District Court for the Northern District of California, Southern Division

OPINION—March 16, 1961

Before: HAMLEY, HAMLIN and KOELSCH, Circuit Judges.
HAMLIN, Circuit Judge.

An indictment in two counts was filed in the United States District Court for the Northern District of California, Southern Division, charging Wong Sun and James Wah Toy, hereinafter called the appellants, in the first count with conspiracy to violate the narcotic laws, 21 U.S.C.A. § 174, and in the second count with a violation of 21 U.S.C.A. § 174 in that they "did fraudulently and knowingly conceal, transport and facilitate the transportation and concealment of a narcotic, to-wit, heroin, then and there knowing the same to have been transported and brought into the United States contrary to law." After pleading not guilty, the appellants waived a jury and were tried by the district judge. They were convicted on the charge contained in the second count of the indictment and have appealed to this court. This court has jurisdiction of the appeal under 28 U.S.C.A. § 1291.

The evidence showed that on June 4, 1959, at about 2 a.m., federal narcotic agents arrested one Hom Way for a narcotic violation. He told the agents that he had purchased an ounce of heroin the night before from a person known as Blackie Toy who operated a laundry [fol. 182] on Leavenworth Street in San Francisco. At the time he was arrested, Hom Way possessed narcotics,

but the agents had no reason to believe that he had previously been arrested or convicted for narcotic violations. One agent testified that he had known Hom Way for about six weeks, but that Hom Way had not given him any information before as to any trafficking in narcotics by other persons. The agents then proceeded to 1733 Leavenworth Street, which premises consisted of a laundry in front and living quarters in the rear. There is some conflict in the testimony as to what occurred there, but in view of the conviction of the appellants, we shall take the version most favorable to the government. A government agent testified that he arrived at this address at approximately 6:30 a.m., rang the bell, and knocked on the door. Appellant Toy opened the door part way, and the agent told him that he wanted some laundry and dry cleaning things. Toy replied, "I don't open till eight o'clock," and told him to come back later. The agent then testified, "I pulled my badge out and told him, 'I am a federal narcotics agent.' And at that time he slammed the door and started running . . . inside his living quarters." The agent then forced[1] the door open and went in, following Toy who ran into the room where his wife was sleeping in bed with a baby. The agent ran across the room and grabbed him, saying, "Just stay where you are; you are under arrest." Toy was then handcuffed.

The premises were searched, but no narcotics were found. It is undisputed that at the time of this arrest the agents did not have an arrest warrant, nor did they have a search warrant. The record shows that while at the premises a narcotic agent said to Toy, "We understand you were furnishing narcotics to Hom Way," and Mr. Toy said, "No, I wasn't." The agent replied, "Well, we just talked to him. He is under arrest, and he says he got narcotics from you." Toy replied, "No, I haven't been selling any narcotics at all. However, I do know somebody who has." When the agent asked who, Toy replied, "Well, I only know him as Johnnie. I don't know his last name." He then told the agent where

[1] It was stipulated that the door was broken and splintered around the lock.

Johnnie lived, telling him the type and color of the house. According to the agent, Toy then said that he had been [Feb. 18] there the night before. The agent asked him how much "stuff" Johnnie had and Toy said that he had about a "piece."[2] He said that Johnnie had a bedroom in this house, upstairs "in his folks' house." The agents then went out to Johnnie's house, found Johnnie Yee in an upstairs bedroom and in a dresser drawer found some white paper bindles which contained heroin.

The evidence concerning the arrest of Wong Sun may be summarized as follows. On the morning of June 4 when the agents arrested Johnnie Yee, he told that one "Sea Dog," as Yee knew him, together with appellant Toy, had brought the narcotic to Yee's home around the first of June. Johnnie Yee stated that he did not know of any other name but "Sea Dog" and did not know where he lived. With this information the agents went back to appellant Toy and learned from him that "Sea Dog" was Wong Sun and that he resided on Franklin Street. The agents then took Toy and drove out to Franklin Street where Toy pointed out where Wong Sun lived. An agent rang the doorbell and, after the door had been opened by a woman, he asked for Mr. Wong. This woman was on the landing of the stairs, but before she answered another lady, Betty Wong, appeared at the top of the stairs. The agent who rang the bell said that he was from the Federal Bureau of Narcotics. Another agent said, "Hello, Betty," and they then went up the stairs and into a back room where they were told that Wong Sun was sleeping. Wong Sun was arrested and handcuffed and the premises were searched.

The testimony shows that subsequent to the arrests each appellant separately was interviewed by a federal narcotic agent. The agent testified that before talking to the appellants he told each of them that he was entitled to the advice of an attorney; that he didn't have to answer the questions unless he voluntarily did so; and that the statements that he made could be used against him. Each was also told that the agent was

[2] About one ounce.

making no promises of "any bargains or deals or anything with him." A discussion was then had with each appellant as to the circumstances of the narcotic transactions. There were questions and answers, and the appellant being questioned was then asked to repeat the whole thing to the agent who at that time took it down [fol. 184] in rough note form. Subsequently these notes were transcribed and a typewritten statement was prepared. Each appellant was shown his own statement and it was read to him in English and also interpreted to him in Chinese. Toy "read it out loud to me, and there was only one word he couldn't pronounce, but he knew the meaning of it." He was then asked if he wished to sign his statement.

> "He said he had no objection to doing so, but first he wanted to know if the others involved in this investigation or case had signed theirs. I said I couldn't give him that information in all fairness to other persons; and he said, 'Well, unless you can prove to me that they have signed theirs, I don't want to sign it.'
>
> "I asked him if all the information contained in this statement which he had read and I had read to him were true and correct, and he stated, 'Yes, they were'...."

A similar conversation was had with appellant Wong Sur in which he also said that all of the facts stated in the statement prepared by the agent were true, but he likewise refused to sign the statement. During the trial these statements were offered in evidence and were admitted over the objection of appellants. The statement made by each appellant to the agent was sufficient to amount to a confession that such appellant, together with the other appellant, transported heroin to Yee's house and left it there.

Upon this appeal appellants rely mainly upon the following points: (1) That the arrest of each appellant was an illegal arrest, having been made without a warrant of arrest and without probable cause therefor; (2) That since the arrests were illegal, the confessions of

appellants were improperly received in evidence, being the results of illegal arrests; (3) That the information received by the agents prior to the confession of Toy and Wong Sim could not be used because it was "the fruit of the poisonous tree"; (4) That the confession of each appellant was improperly admitted into evidence, because there was no proof of a *corpus delicti*; (5) That the admission in evidence of each of the written statements prepared by the agent after his conversation with each appellant was improper.

[fol. 185] We shall consider these points in the above order.

An arrest without a warrant may not be made unless the officer making the arrest has "probable cause" within the meaning of the Fourth Amendment and "reasonable grounds" within the meaning of the Narcotic Control Act of 1956[1] to believe that the person arrested had committed or was committing a violation of the narcotic laws. If the officer making the arrest has such a belief, the arrest, though without a warrant, is lawful. *Rodgers* v. *United States*, 267 F.2d 79 (9 Cir. 1959); *Weeks* v. *United States*, 232 U.S. 383 (1914); *Carroll* v. *United States*, 267 U.S. 132 (1925); *Draper* v. *United States*, 358 U.S. 307 (1958). In his case, the officers went to Toy's laundry and home solely by reason of the statement of a Chinese, arrested a few hours before, that he had purchased narcotics from Toy. While the record does show that the agent said that he had known Hom Way for six weeks, it does not show in what way he had known him; there is no evidence that Hom Way had ever given any reliable information to the officers upon any previous occasion. In fact, there was evidence to the contrary; to-wit, that they had not received any information from him on prior occasions. As this court said in *Rodgers* v. *United States*, *supra*, ". . . where the officer makes an arrest without any knowledge of the commission of a crime except from an informer whom he does not know to be reliable, the courts have consistently held there is no reasonable grounds for the arrest." There is no show-

[1] The appropriate provisions of the Narcotic Control Act of 1956 are set forth in 26 U.S.C.A. § 7607.

ing in this case that the agent knew Hom Way to be reliable.

The government urges, however, that the events which transpired at Toy's house at 6:30 in the morning were sufficient to provide reasonable cause for the arrest. These events have been set out earlier in this opinion. They are that after the agent had got the door of the laundry opened by stating that he wanted some laundry and after being told by Toy to come back at eight o'clock, he then pulled out his badge and said, "I am a narcotics officer." With that Toy closed the door and ran back into his bedroom. Admittedly, the agent then forced the door and ran after Toy into the bedroom where he arrested him. We see nothing in the circumstances occurring at Toy's premises that would provide sufficient [fol. 186] justification for his arrest without a warrant. We therefore hold that his arrest was illegal.

Concerning the arrest of Wong Sun, the facts show that the agent went to the door of the premises where he lived on an upper story. After ringing the bell, the door was opened by a buzzer, and after the question was asked, "Is Mr. Wong in?" the agents went up the stairs, into the bedroom where Wong Sun was sleeping with his wife and child, placed him under arrest, and handcuffed him. The basis for going to Wong Sun's residence to arrest him was the statement of Johnnie Yee that he had obtained the narcotic found in his residence from Wong Sun and Toy. As was the case with Hom Way, there is no showing that Johnnie Yee was a reliable informer; in fact, the evidence is entirely negative as to whether the agents had ever heard of him before that day. We hold, likewise, that the arrest of Wong Sun was not made with probable cause or with reasonable grounds to believe that he had committed or was committing a crime. Therefore his arrest was illegal.

This brings us to the appellants' second contention.

There has been no contention made in this case that the confession of either appellant was involuntary or was obtained by means of force, threats, or other forms of duress. Neither has there been any contention that the confession of either appellant was the result of long de-

tention or psychological pressure or was accompanied by failure to promptly bring him before a United States Commissioner for arraignment. These practices have been denounced in *McNabb* v. *United States*, 318 U.S. 332 (1943); *Upshaw* v. *United States*, 335 U.S. 410 (1948); *Mallory* v. *United States*, 354 U.S. 449 (1957); and many other cases. No evidence that would bring this case within the prohibitions of these last mentioned cases has been introduced.

In *United States* v. *Walker*, 197 F.2d 287 (2 Cir. 1952), the appellant contended that he was illegally arrested and that he confessed while he was being held by virtue of an illegal arrest. The court admitted the confession into evidence, saying "This was a voluntary confession. The fact that it was made while he was under illegal arrest does not make it incompetent." In *Smith* v. *United States*, 254 F.2d 751 (D.C.Cir. 1958), the appellant moved [fol. 187] that his confession be excluded since it was made in the course of an illegal arrest. The court held that the arrest was legal, but stated: "We believe the rule to be that confessions made while a defendant is under arrest are admissible in evidence if voluntarily made and if Rule 5, Federal Rules of Criminal Procedure, 18 U.S.C.A., is not violated, whether the arrest was legal or illegal." In *Dailey* v. *United States*, 261 F.2d 870 (5 Cir. 1959), the appellant contended that his arrest was illegal. The court held that the arrest was legal, but states "Even if the arrest and detention were illegal, we take the position that the confession was admissible, since there is no evidence that the confession was induced by the detention."

We hold that the fact that these confessions were obtained while the appellants were held under illegal arrest does not render them inadmissible.

We likewise find that appellants' reliance upon the so-called "fruit of the poisonous tree" doctrine is misplaced.[1] When that doctrine has been invoked the evidence seized or the information obtained by illegal wire-tapping has

[1] This so-called doctrine is discussed in *Nardone* v. *United States*, 308 U.S. 338; *Silverthorn Lumber Co.* v. *United States*, 251 U.S. 385, and *United States* v. *Coplon*, 185 F.2d 629.

been seized or obtained without the consent or against the will of the person involved. In this case any statements made by Toy prior to his confession were voluntary. There is no contention made nor is there any evidence tending to establish that these statements were in any way the result of pressure or coercion or made during unreasonable detention.

We hold that the illegal arrest did not so contaminate the voluntary pre-confession statements as to prevent the use by the officers of the information given therein.

The next contention of appellants is that there was not sufficient evidence corroborating appellants' confessions. The question of the quantum of corroboration necessary to substantiate a confession was discussed in *Smith* v. *United States*, 348 U.S. 147 (1954). The Supreme Court there said:

> "There has been considerable debate concerning the quantum of corroboration necessary to substantiate [fol. 188] the existence of the crime charged. It is agreed that the corroborative evidence does not have to prove the offense beyond a reasonable doubt, or even by a preponderance, as long as there is substantial independent evidence that the offense has been committed, and the evidence as a whole proves beyond a reasonable doubt that defendant is guilty. *Grigg* v. *United States*, 113 F.2d 687; *Jordan* v. *United States*, 60 F.2d 84; *Forte* v. *United States*, *supra*; *Daeche* v. *United States*, *supra*. But cf. *United States* v. *Fenwick*, 177 F.2d 488. In addition to differing views on the substantiality of specific independent evidence, the debate has centered largely about two questions: (1) whether corroboration is necessary for all elements of the offense established by admissions alone, compare *Ercoli* v. *United States*, *supra*, and *Pines* v. *United States*, *supra*, with *Wemkoop* v. *United States*, *supra*, and *Pearlman* v. *United States*, 10 F.2d 460, and (2) whether it is sufficient if the corroboration merely fortifies the truth of the confession, without independently establishing the crime charged, compare *Pearlman* v. *United States*, *supra*, and *Daeche* v. *United States*, *supra*, with *Pines*

v. *United States*, *supra*, and *Forte* v. *United States*, *supra*. We answer both in the affirmative. All elements of the offense must be established by independent evidence or corroborated admissions, but one available mode of corroboration is for the independent evidence to bolster the confession itself and thereby prove the offense through the statements of the accused. Cf. *Parker* v. *State*, 228 Ind. 1, 88 N.E.2d 550."

In this case the narcotic was found in the residence of Yee. This in itself establishes that someone was guilty of concealment and transportation of narcotics in violation of 21 U.S.C.A. § 174. This narcotic was introduced into evidence. The advance statement of Toy that narcotics could be expected to be found in Yee's house, and that he was familiar with that house and the place where the narcotic was stored, together with the subsequent admissions of Toy and Wong Sun that they had brought the narcotic to Yee's house, amount to sufficient evidence to support the conviction. We believe that there was sufficient evidence to fortify the truth of the confessions and to justify the belief that the post-arrest statements of [fol. 189] the appellants as to the concealment and transportation of the narcotic were reliable. *Leonard* v. *United States*, 278 F.2d 418 (9 Cir. 1960); *Lohmann* v. *United States*, —— F.2d —— (9th Cir. 1960).

The fourth contention is that the written statements prepared by the agent after his conversation with each appellant were not admissible because such written statements were not signed by the appellants.

The agent testified that after he had written out the statements, each appellant read his own statement; each was then asked whether the statement was true; and each answered that it was. The statements were then offered in evidence and were admitted by the court. While this does not appear to be the usual method of introducing statements of defendants, we cannot say that the defendants were prejudiced thereby. If the agent had been asked to give the conversation that he had had with each appellant and then had read the statement that he had prepared, stating that it contained the substance of the

conversation, there could have been no objection. Counsel, with the statement in evidence and having it before him, could have cross-examined the agent as to any particular admission made therein and could have obtained in detail from the agent on cross-examination the same information as if the agent had read the statement in evidence. The record shows that after the statements were admitted into evidence experienced counsel representing appllants made no attempt whatever to cross-examine the agent as to any of the statements made by either appellant. Taking into account all of the circumstances, we see no error in the admission of the statements.

The judgment is affirmed.

HAMLEY, Circuit Judge (dissenting):

In my view the convictions should be set aside because as to both appellants the government developed its case on the basis of information obtained from Toy at his home immediately after enforcement officers made an illegal entry into that home. The fact that the information was derived from voluntary statements made by Toy at that time and place, rather than as a result of the seizure of physical objects (Silverthorn Lumber Co. [fol. 190] v. United States, 251 U.S. 385) or observations made by law enforcement officers while illegally on the premises (McGinnis v. United States, 1 Cir., 227 F.2d 598), seems to me immaterial.

As I understand it, the test of the "fruit of the poisonous tree" doctrine (Nardone v. United States, 308 U.S. 338) is whether the government seeks to avail itself of knowledge which it would not have had but for the lawless conduct of enforcement officers. For all that is shown in this record, the government would not have known of Johnnie Yee and so built its case had not an illegal entry of Toy's home been effected.

The guarantees of the Fourth Amendment are too fundamental to warrant hair-splitting distinctions between information based on physical evidence obtained or observations made at the scene of an illegal entry and information based on voluntary statements by the de-

fendant at the scene of the illegal entry. The chances are always pretty good that law enforcement officers can obtain valuable leads during the course of adroit questioning. If such leads are not to be regarded as contaminated harvest, the "fruit of the poisonous tree" doctrine will no longer serve its designated purpose of discouraging Fourth Amendment violations.

I realize that a contrary view was expressed in Smith v. United States, D.C.Cir., 254 F.2d 751, one judge dissenting. But the force of that pronouncement is undermined by the fact that it was given only as an alternative ground for affirmance, the court having already determined that the arrest and search were legal. I find much more convincing the contrary view expressed by the same court speaking through Circuit Judge (later Chief Justice) Vinson in Nueslein v. District of Columbia, D.C. Cir., 115 F.2d 690.

(Endorsed) Opnion and Dissenting Opinion Filed March 10, 1961.

Frank H. Schmid, Clerk.

[fol. 191]

IN UNITED STATES COURT OF APPEALS
FOR THE NINTH DISTRICT

No. 16960

WONG SUN and JAMES WAH TOY, APPELLANTS

vs.

UNITED STATES OF AMERICA, APPELLEE

JUDGMENT—March 10, 1961

Appeal from the United States District Court for the Northern District of California, Southern Division.

This cause came on to be hear on the Transcript of Record from the United States District Court for the Northern District of California, Southern Division and was duly submitted.

On consideration whereof, It is now ordered and adjudged by this Court, that the judgment of said District Court in this cause be and hereby is affirmed.

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[fol. 192]

IN UNITED STATES COURT OF APPEALS
FOR THE NINTH DISTRICT

• • • •

Before: Hamley, Hamlin and Koelsch, Circuit Judges

MINUTE ENTRY OF ORDER DENYING PETITION FOR REHEARING—April 12, 1961

On consideration thereof, and by direction of the Court, IT IS ORDERED that the petition of appellant, filed April 6, 1961 and within time allowed therefor by rule of court, for a rehearing of above cause be, and hereby is, denied.

[fol. 193] Clerk's Certificate to foregoing transcript omitted in printing

[fol. 194]

SUPREME COURT OF THE UNITED STATES

ORDER GRANTING MOTION FOR LEAVE TO PROCEED FORMA PAUPERIS AND GRANTING PETITION FOR WRIT OF CERTIORARI—October 9, 1961

ON PETITION FOR WRIT OF CERTIORARI to the United States Court of Appeals for the Ninth Circuit.

ON CONSIDERATION of the motion for leave to proceed herein in forma pauperis and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed in forma pauperis be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted. The case is transferred to the appellate docket as No. 479 and placed on the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below, which accompanied the petition, shall be treated as though filed in response to such writ.

October 9, 1961

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1961

No. 479

WONG SUN and JAMES WAH TOY,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR PETITIONERS

Opinion Below

The opinion of the Court of Appeals (R. 135) is reported at 288 Fed. 2d 366.

Jurisdiction

The judgment of the Court of Appeals was entered March 10, 1961 (R. 146). A petition for rehearing was denied on April 12, 1961 (R. 146). The petition for a writ of certiorari was filed on May 5, 1961 and was granted on October 9, 1961 (R. 147). The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1961

No. 479

WONG SUN and JAMES WAH TOY,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR PETITIONERS

SOL A. ABRAMS
400 Montgomery Street
San Francisco 4, California
Counsel for Petitioners

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SUBJECT INDEX

BRIEF FOR PETITIONERS:

CITATIONS

Questions Presented

Principal Question:

Are federal agents permitted to avail themselves of information obtained from a defendant following his illegal arrest?

Related Questions:

1. Is a confession made by a defendant following his illegal arrest, the product of the illegal arrest and as such inadmissible in the trial against him?

2. Is a defendant's confession sufficiently corroborated by evidence of narcotics found in another person's home?

Constitutional Provisions and Statutes Involved

United States Constitution, Amendment IV, provides:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

Title 21, U.S.C. Section 174, provides:

> "Whoever fraudulently or knowingly imports or brings any narcotic drug into the United States or any territory under its control or jurisdiction, contrary to law, or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of any such narcotic drug after being imported or brought in, knowing the same to have been imported

or brought into the United States contrary to law, or conspires to commit any of such acts in violation of the laws of the United States, shall be imprisoned. . . .

"Whenever on trial for a violation of this section the defendant is shown to have or to have had possession of the narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury."

Title 28, U.S.C. Section 1254(1) provides:

"Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

"(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;"

Statement

An indictment in two counts returned in the United States District Court for the Northern District of California charged petitioners with conspiracy to violate the narcotic laws, and with concealment and transportation of heroin in violation of 21 U.S.C. 174 (R. 4). After waiver of jury trial, petitioners were found guilty by the court on the substantive count (R. 122). Petitioner Toy was sentenced to imprisonment for five years, and petitioner Wong Sun for ten years (R. 123).

1. *Summary of the evidence:*

On June 4, 1959, at about 2 o'clock A. M. Hom Way, whom one of the agents had known for six weeks, was arrested by federal narcotic agents in possession of narcotics. Hom Way was questioned and about 5:30 A. M.

told the agents he purchased an ounce of heroin the night before from a person known as "Blackie Toy" who operated a laundry on Leavenworth Street in San Francisco. This was the first time Hom Way had ever given information as to narcotic traffickers or violations or dealers in narcotics (R. 54-56).

At 6:30 A. M. the federal agents arrived at the closed premises on Leavenworth Street operated by petitioner Toy as a laundry in front and occupied as living quarters in the rear. One of the agents, a Chinese, knocked on the locked glass door and rang the bell. Toy, who was asleep with his family in the rear living quarters, came into the front laundry section and unlocked and opened the front door part way and told the agent, who asked for his laundry, he was closed and to come back, that he didn't open until 8:30.

There is some conflict as to what immediately followed. Toy testified he then closed and locked the front door and as he started toward his living quarters the agents, about seven in number, broke in and pursued him through the laundry and into his bedroom where the agents identified themselves and handcuffed him and then thoroughly searched the premises (R. 31-38).

Agent Wong testified that he got the front door half way open and then pulled out his badge and said he was a federal narcotic agent, whereupon Toy slammed the door and started running inside his living quarters; that he then pursued him to his bedroom, drew his gun, placed him under arrest and handcuffed him (R. 51-2).

The agent admitted, however, he used force to open the front door (R. 53) and Toy testified the agent broke in (R. 38); Toy's wife was available to testify as to the condition of the front door both before and after the entry of

the agents, and the government stipulated the door and lock were damaged by the entry of the agents (R. 48).

After Toy was placed under arrest and handcuffed (R. 65) he was questioned by the agents who accused him of furnishing narcotics to the informant, Hom Way. Toy denied this, but said a person named Johnny who lived on Eleventh Avenue was selling narcotics and had a "piece" and described to the agents Johnny's house and bedroom and its location and mentioned he had been there the night before (R. 63).

One of the agents, accompanied by two police officers, then immediately went to the described house, found a Johnny Yee there, who turned over to them a quantity of heroin he took from a dresser drawer in his bedroom. The agent then arrested Yee (R. 63-64).

Immediately following his arrest, Yee told the agents the narcotics had been brought to his home three days before by Toy and a person known to him as "Sea Dog", and that they had been at his house on the evening of June 3d (R. 90).

At about 10:30 A. M. of the day of arrest, June 4th, Toy, while being questioned further at the narcotic bureau offices, identified petitioner Wong Sun as "Sea Dog" and was immediately taken by the agents to locate and point out Wong Sun's residence (R. 95-96).

Again there is some conflict in the testimony as to the manner in which the agents entered Wong Sun's premises, an upper flat.

Agent Wong testified he rang the door-bell, heard a buzzer, pushed open the door and asked a Chinese woman who appeared on an upper landing for Mr. Wong; that Betty Wong, petitioner's wife appeared at the top of the

stairway; that he started up the stairs and identified himself as a federal narcotic agent; that agent Casey followed behind and when told by Betty Wong that her husband was asleep in the back bedroom went there and placed him under arrest. Other agents, about six in number, followed Casey into the premises. Wong Sun was handcuffed and the premises were searched (R. 97-99).

Annie Leong, Wong Sun's sister-in-law, testified that when she responded to the bell ring and pressed the buzzer, Agent Wong appeared at the front door and asked for a Mr. Leong, the owner of the house; that when she informed him there was no Mr. Leong, that she was the owner, he said "Thank you" and believing he was leaving, she turned to go back upstairs, when someone grabbed hold of her and pulled her into the bedroom where Wong Sun and his wife were sleeping and that about six agents came in; she thought the agent mistook her for Wong Sun's wife, because they looked quite a bit alike (R. 78-87).

At no time did the agents have either a search warrant or a warrant of arrest (R. 34, 89).

On June 5th and June 9th, each of the petitioners was questioned separately by an agent at the office of the narcotic bureau. Questions and answers were reduced to written statements purporting to be confessions, but the petitioners, while acknowledging the correctness of the statements, refused to sign them (R. 66-72). The statements were admitted into evidence over petitioners' objection (R. 106). In the statements petitioners told of visiting Johnny's house on June 3d to smoke heroin: Wong Sun's statement told of procuring heroin for Toy to sell to Johnny and of driving with Toy to Johnny's house to deliver heroin. Toy's statement said that on occasions prior to June 1st he drove Wong Sun to Johnny's house to deliver heroin.

2. The Court of Appeals, Circuit Judge Hamley dissenting, affirmed the convictions (R. 146). The Court ruled, however, that the arrest of each petitioner was illegal since it was based on information received from an informer not known to be reliable and therefore was without probable cause (R. 140).

The Court held, nevertheless, that the illegality of the arrests did not render inadmissible the confessions (R. 141) or so contaminate the pre-confession statements as to prevent the use by the agents of the information given therein (R. 142), which led the agents to the finding of the heroin and the subsequent arrest of Wong Sun. The Court further held the confessions were sufficiently corroborated by other evidence (R. 143).

Circuit Judge Hamley, dissenting (R. 144), was of the opinion the convictions should be set aside because the government developed its case on the basis of information obtained from Toy after his illegal arrest.

Summary of Argument

(Principal Question Involved)

The government developed its entire case against petitioners through information obtained from petitioner Toy following his illegal arrest. The information led the agents to the finding of the heroin and to the identity and arrest of petitioner Wong Sun. Under the "fruit of the poisonous tree" doctrine of the *Silverthorne* and *Nardone* cases[1] the illegal arrest so contaminated Toy's statements as to prevent the use by the agents of the information given therein.

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[1] *Silverthorne Lumber Co.* v. *United States*, 251 U.S. 385; *Nardone* v. *United States*, 308 U.S. 338.

ARGUMENT

1.

Information Obtained From a Defendant as the Result of an Illegal Arrest Cannot Be Used by the Government to Develop Its Case.

The Court of Appeals held the arrest of both petitioners was illegal (R. 140). Quoting from the Opinion (R. 139):

> "In this case, the officers went to Toy's laundry and home solely by reason of the statement of a Chinese, arrested a few hours before, that he had purchased narcotics from Toy. While the record does show that the agent said that he had known Hom Way for six weeks, it does not show in what way he had known him; there is no evidence that Hom Way had ever given any reliable information to the officers upon any previous occasion. In fact, there was evidence to the contrary; to wit, that they had not received any information from him on prior occasions. As this court said in *Rodgers* v. *United States,* supra [267 Fed. 2d 79] . . . 'where the officer makes an arrest without any knowledge of the commission of a crime except from an informer whom he does not know to be reliable, the courts have consistently held there is no reasonable ground for the arrest.' There is no showing in this case that the agent knew Hom Way to be reliable." [2]

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[2] California courts likewise have held an arrest is not based on probable cause when the only information possessed by the officer is secured from an informant who is not known to be reliable. *People* v. *Walker,* 165 Cal.App. 2d 462, 331 Pac. 2d 668; *People* v. *O'Neill,* 10 Cal. Rptr. 114.

It cannot be *assumed* that information given by an informant is reliable. *Wrightson* v. *United States,* 222 Fed.2d 556 (C.A.D.C.); *United States* v. *Castle,* 138 F. Supp. 436, 439 (D.C. Dist.Col.).

See also *Contee* v. *United States,* 215 F.2d 324 (C.A.D.C.),

The Court put aside the Government's contention that the events which transpired at Toy's house at 6:30 in the morning were sufficient to provide reasonable cause for the arrest, with the observation (R. 140):

> "These events have been set out earlier in this opinion. They are that after the agent had got the door of the laundry opened by stating that he wanted some laundry and after being told by Toy to come back at eight o'clock, he then pulled out his badge and said, 'I am a narcotics officer.' With that Toy closed the door and ran back into his bedroom. Admittedly the agent then forced the door and ran after Toy into the bedroom where he arrested him. We see nothing in the circumstances occurring at Toy's premises that would provide sufficient justification for his arrest without a warrant."[3]

Notwithstanding that the arrest of Toy was illegal, the Court of Appeals mistakenly ruled: "The illegal arrest

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Cockran v. *United States*, 291 F.2d 633 (C.A. 8), *Cervantes* v. *United States*, 263 F.2d 800, 804 (C.A. 9).

In *People* v. *Dawson*, 150 Cal.App. 2d 119, 310 P.2d 162, the California Supreme Court adopted the yard stick that "reliable" informant means a person whose information in the past led the officers to valid arrests.

In *People* v. *Witt*, 159 Cal.App. 2d 492, 324 P.2d 79, it was held an arrested narcotics offender is not considered a "reliable" informant.

[3] The fact Toy closed the door and ran back into his bedroom did not justify the forced entry of the agents. *Miller* v. *United States*, 357 U.S. 301; *United States* v. *Castle*, 138 F.Supp. 436 (D.C. Dist. Col.); *Gascon* v. *Superior Ct.*, 169 Cal.App. 2d 356, 337 P.2d 201; *Badillo* v. *Superior Ct.*, 46 Cal. 2d 269, 294 P.2d 23; *People* v. *O'Neill*, 10 Cal. Rptr. 114.

The officers broke in without first giving notice of their authority and purpose. *Miller* v. *United States*, 357 U.S. 301.

Entry was made by subterfuge, followed by force. *Gatewood* v. *United States*, 209 F.2d 789 (C.A.D.C.).

did not so contaminate the voluntary pre-confession statements so as to prevent the use by the officers of the information given therein" (R. 142).

The exclusionary rule, originating with *Weeks* v. *United States*, 232 U.S. 383 in 1914 has withstood the rigid test of time and today stands as an unmovable barrier against the constant threat of Constitutional impairment.

"To the exclusionary rule of Weeks v. United States there has been unquestioned adherence for now almost half a century." Mr. Justice Stewart in *Elkins* v. *United States*, 364 U.S. 206.

California, in 1955, joined with *Weeks* and adopted the exclusionary rule[4] and this Court in an historical pronouncement in June, 1961 made mandatory compliance with the exclusionary rule by all the states and reaffirmed that the exclusionary rule is of Constitutional origin and an essential part of the Fourth Amendment.[5]

"Its purpose is to deter—to compel respect for the constitutional guaranty in the only effectively available way—by removing the incentive to disregard it."[6]

"Evidence obtained [by unreasonable search and seizure] must be excluded * * * since in the absence of that rule of

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[4] *People* v. *Cahan*, 44 C.2d 434, 282 P.2d 905:

"We have been compelled to reach that conclusion because other remedies have completely failed to secure compliance with the constitutional provisions on the part of police officers with the attendant result that the courts under the old rule have been constantly required to participate in, and in effect condone, the lawless activities of law enforcement officers." (Id. at 911-912.)

[5] *Mapp* v. *Ohio*, 367 U.S. 643.

[6] Mr. Justice Stewart in *Elkins* v. *United States*, 364 U.S. 206, 217.

evidence the Amendment would have no effective sanction."[7]

"To permit an officer • • • to acquire evidence illegally and in violation of sacred constitutional guaranties, and to use the illegally acquired evidence in the prosecution • • • strikes at the very foundation of the administration of justice, and where such practices prevail makes law enforcement a mockery."[8]

A further compelling reason underlies the exclusionary rule.

"But there is another consideration—the imperative of judicial integrity. It was of this that Mr. Justice Holmes and Mr. Justice Brandeis so eloquently spoke in Olmstead v. United States, 277 U.S. 438, at 469, 471, more than 30 years ago. 'For those who agree with me', said Mr. Justice Holmes, 'no distinction can be taken between the Government as prosecutor and the Government as judge.' 277 U.S. at 470 (Dissenting opinion.) 'In a government of laws', said Mr. Justice Brandeis, 'existence of the government will be imperilled if it fails to observe the law scrupulously. Our government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example. Crime is contagious. If the government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy. To declare that in the administration of the criminal law the end justifies the means—to declare that the government may commit crimes in order to secure the conviction of a private criminal—would bring terrible retribution. Against

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[7] Dissenting opinion of Mr. Justice Douglas in *Wolf* v. *Colorado*, 338 U.S. 26.

[8] *Atz* v. *Andrews*, 84 Fla. 43, 52, 94 So. 329, 332.

that pernicious doctrine this Court should resolutely set its face.'" 277 U.S. at 485 (Dissenting opinion).[9]

"The exclusionary evidence rule is morally correct and appropriate to a free society. It is a rule naturally suggested by the Constitution itself. * * * It is the most effective remedy we possess to deter police lawlessness.

A moral position of a high order gives support to the rule. It is unseemly that the government should with one hand forbid certain police conduct and yet, at the same time, attempt to convict accused persons through use of the fruits of the very conduct which is forbidden.

The moral point not only rests upon an ethical judgment that government hypocrisy is an evil to be avoided for its own sake, but also it take into account the serious undermining of trust in government which is an unavoidable consequence of any scheme permitting the state to benefit from unlawful conduct. * * * Few things are more subversive of free institutions than a mistrust of official integrity. When the police themselves break the law and other agencies of government eagerly reach for the benefits which flow from the breach, it is difficult for the citizenry to believe that the government truly meant to forbid the conduct in the first place." [10]

Professor Paulsen in his illuminating discussion of the exclusionary rule further emphasized the involvement of the courts in dealing with illegally obtained evidence.[11]

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[9] *Elkins* v. *United States*, 364 U.S. 206, 222-3.

[10] Professor Monrad G. Paulsen "The Exclusionary Rule and Misconduct by the Police", Vol. 52, No. 3, September-October, 1961, pp. 257-8, Journal of Criminal Law, Northwestern University School of Law.

[11] "The use of illegal evidence involves the courts, the branch of government most dependent upon popular respect, in a kind of

This Court in *Mapp* v. *Ohio*, 367 U.S. 643, reassuringly re-asserted the deep rooted principles, the foundation of the exclusionary rule:

"• • • if illegally seized evidence can be used against one accused of crime 'the protection of the Fourth Amendment • • • is of no value, and, so far as those thus placed are concerned, might as well be stricken from the constitution.'"

"In the Weeks case, 1914, the Supreme Court for the first time held that in a Federal prosecution the Fourth Amendment barred the use of illegally obtained evidence and the Supreme Court has ever since required of federal law officers a strict adherence to that command which this Court has held to be a clear, specific and constitutionally required —even if judicially implied, deterrent safeguard without insistence upon which the Fourth Amendment would have been reduced to a form of words.' Holmes, J., Silverthorne Lumber Co. v. United States, 251 U.S. 385, 392 (1920). It meant, quite simply, that 'convictions by means of unlawful seizures and enforced confessions . . . should find no sanction in the judgments of the courts . . .' Weeks v.

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ratification of illegal conduct. Judge Traynor of the Supreme Court of California has observed, 'The success of the lawless venture depends entirely on the court's lending its aid by allowing the evidence to be introduced.' [People v. Cahan, 44 Cal. 2d 434, 445, 282 P.2d 905, 912 (1955).] When the prosecutor takes evidence gained by the lawless enforcement of the law and places it before a court, that court by accepting the offer of proof becomes inevitably drawn into the lawlessness. At least, many of the community's most scrupulous and noble will see it so. Judge Condon of Rhode Island has made the point in these words: 'If courts receive evidence knowing that it has been unconstitutionally obtained, they . . . give judicial countenance to the government's violation of the Constitution.' [State v. Olynick, 113 A.2d 123, 131 (R.I. 1955) (dissenting opinion).] • • • The exclusionary rule dissociates the court from any police policy of systematic violation of law."

(Professor Paulsen in Journal of Criminal Law, *supra*, 258.)

United States, supra, at 392, and that such evidence 'shall not be used at all.' Silverthorne Lumber Co. v. United States, supra, at 392" (at 648).

" • • • the history of the criminal law proves that tolerance of shortcut methods in law enforcement impairs its enduring effectiveness." *Miller* v. *United States,* 357 U.S. 301, 313 (1958) (at 658).

"But, as was said in Elkins, 'there is another consideration—the imperative of judicial integrity'. 364 U.S. at 222 . . . Nothing can destroy a government more quickly than its failure to observe its own laws, or worse, its disregard of the charter of its own existence" (page 659).

Under the exclusionary rule evidence obtained in violation of a defendant's constitutional rights to be free from unreasonable arrests, searches and seizures is inadmissible in the trial of a criminal case. Such evidence is not limited to physical or tangible evidence or evidence directly obtained by illegal means. Ever since the decision in the *Silverthorne* case by this Court[12] federal courts and most state courts have consistently ruled out the "derivative" use of illegally seized evidence—evidence discovered by the Government through "clues and leads" produced by illegally seized evidence. Unless this were so, the effectiveness of the exclusionary rule would be impaired and the Constitutional rights not only jeopardized, but destroyed.

The "fruit of the poisonous tree" doctrine introduced in the *Silverthorne* case and followed in the *Nardone* v. *United States*[13] is applicable here. The Court of Appeals erroneously failed to apply it.

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[12] *Silverthorne Lumber Co.* v. *United States,* 251 U.S. 385.

[13] *Silverthorne Lumber Co.* v. *United States,* 251 U.S. 385; *Nardone* v. *United States,* 308 U.S. 338; *McDonald* v. *United States,* 335 U.S. 451. (See concurring opinion of Mr. Justice Jackson.)

Circuit Judge Hamley, in his dissenting opinion, correctly applying the "fruit of the poisonous tree" doctrine, observed: "The government developed its case on the basis of information obtained from Toy at his home immediately after enforcement officers made an illegal entry into that home" (R. 144).

In the *Silverthorne* case, this Court said: " . . . the government now, while in form repudiating and condemning the illegal seizure, seeks to maintain its right to avail itself of the knowledge obtained by that means which otherwise it would not have had," and held: "The essence of a provision forbidding the acquisition of evidence in a certain way is that not merely evidence so acquired shall not be used before the Court, but that it shall not be used at all * * * the knowledge gained by the Government's own wrong cannot be used by it in the way proposed."

In the *Nardone* case, this Court again plainly and forcefully pointed out that: "To forbid the direct use of methods thus characterized, but to put no curb on their full indirect use would only invite the very methods deemed inconsistent with ethical standards and destructive of personal liberty. What was said in a different context in Silverthorne Lumber Co. v. United States, 251 U.S. 385, 392 is pertinent here. 'The essence of a provision forbidding the acquisition of evidence in a certain way is that not merely evidence acquired shall not be used before the Court, but that it shall not be used at all.'

"Here, as in the Silverthorne case, the facts improperly obtained do not 'become sacred and inaccessible. If knowledge of them is gained from an independent source they may be proved like any others, but the knowledge gained by the Government's own wrong cannot be used by it' simply because it is used derivatively."

The entire case against petitioners was a "fruit of the poisonous tree".

"Having forced an entry without either a search warrant or an arrest warrant, to justify it, the felonious character of their entry, it seems to me, followed every step of their journey inside the house and tainted its fruits with illegality." [14]

"The government cannot violate the Fourth Amendment —in the only way in which the government can do anything, namely through its agents—and use the fruits of such unlawful conduct to secure a conviction. Weeks v. United States [232 U.S. 383]. Nor can the government make indirect use of such evidence for its case, Silverthorne Lumber Co. v. United States, * * *, or support a conviction on evidence obtained through leads from the unlawfully obtained evidence, cf. Nardone v. United States." [15]

As Mr. Justice Frankfurter put it:

"The contrast between morality professed by society and immorality practiced on its behalf makes for contempt of law. Respect for law cannot be turned off and on as though it were a hot-water faucet." [16]

The exclusionary principle applies to the "fruit of the poisonous tree" as well as to the tree itself. It only becomes necessary to discover and isolate evidence that is the contaminated fruit to suppress and exclude it.

Courts of Appeal in other circuits, federal district and state courts, have consistently adhered to the holdings in

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[14] From concurring opinion of Mr. Justice Jackson in *McDonald* v. *United States*, 335 U.S. 451.

[15] From the opinion in *Walder* v. *United States*, 347 U.S. 62.

[16] *On Lee* v. *United States*, 343 U.S. 747, 759.

the *Silverthorne* and *Nardone* cases in applying the "fruit of the poisonous tree" doctrine, under varying facts and circumstances.

In *Nueslein* v. *Dist. of Columbia*[17] Circuit Judge Vinson (later Chief Justice) said:

"The Amendment does not outline the method by which the protection shall be afforded, but some effective method must be administered; * * * A simple, effective way to assist in the realization of the security guaranteed by the IVth Amendment, in this type of case, is to dissolve the evidence that the officers obtained after entering and remaining illegally in the defendant's home."

In *Somer* v. *United States*[18] the Court observed:

"Somer's whereabouts was unknown to the officers * * *, it was the information unlawfully obtained which determined their (officers') course. Since, therefore, the seizure must be set down to information which the officers were forbidden to use, it was itself unlawful under well-settled law." (Citing the *Silverthorne* and *Nueslein* cases.)

In *McGinnis* v. *United States*[19] the Court ruled:

"We find no basis in the cases or in logic for distinguishing between the introduction into evidence of physical objects illegally taken and the introduction of testimony concerning objects illegally observed. We are aware of no case which makes this distinction. Moreover, it seems to us that the protection afforded by the Constitution against unreasonable search and seizure would be narrowed down to a virtual nullity by any such view of the law, which in

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[17] 115 F.2d 690 (C.A.D.C.).

[18] 138 F.2d 790 (C.A. 2).

[19] 227 F.2d 598 (C.A. 1).

effect would grant to the victims of unreasonable search and seizure the rather unsubstantial right to be convicted on the basis of evidence which was illegally observed rather than evidence which was illegally taken."

In *United States* v. *Kempe*[20] the Court in following the rule laid down by this Court in the *Nardone* case, said:

"The United States Supreme Court has emphatically laid down the rule that the Government cannot use evidence against a defendant, the knowledge of which evidence had its origin in the invasion of the defendant's rights, and is the fruit of a 'poisonous tree'."

The California Supreme Court has strongly supported and consistently followed the "fruit of the poisonous tree" doctrine of the *Silverthorne* and *Nardone* cases.[21]

In *Bolger* v. *Cleary*[22] a Federal Court enjoined a state official from testifying in a state proceeding to information learned by him as a result of his co-operation with federal officials in an illegal search and seizure and an illegal detention.

In *Silverman* v. *United States*[23] this Court barred admission of testimony growing out of the use of an electronic device that penetrated the wall of defendant's premises.

In *Simmons* v. *State*[24] where the charge was illegal possession of intoxicating liquors, officers illegally searched

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[20] 59 F. Supp. 905 (Dist. Ct. N.D. Iowa).
See also *Fraternal Order of Eagles* v. *United States*, 57 F.2d 93 (C.A. 3).

[21] *People* v. *Berger*, 44 Cal.2d 459, 282 P.2d 509; *Badillo* v. *Superior Court*, 46 Cal.2d 269, 294 P.2d 23; *People* v. *Dixon*, 46 Cal.2d 456, 296 P.2d 557.

[22] 293 F.2d 368 (C.A. 2).

[23] 365 U.S. 505.

[24] Okla. Cr. 277 P.2d 196.

defendant's automobile and found some whiskey, and as a result followed tracks of defendant's automobile about 250 feet to an overturned boat in the pasture which when searched revealed an additional quantity of whiskey.

The court, in citing and relying upon the *Silverthorne* and *Nardone* cases, held the search was illegal from beginning to end—"void ab initio"—the search of the pasture could not be disassociated from the search of the automobile—that it was one continuous search and the finding of the liquor in the pasture was a direct outgrowth of the illegal search of the automobile.

The court said: "In the latter (Nardone) case the United States Supreme Court held that a conviction sustained on evidence secured through leads obtained by reason of an illegal search and seizure cannot be upheld."

In questioning Toy following his illegal arrest, "links and leads tending to establish"[25] the Government's case were discovered.

In *State* v. *Hunt*[26] the Court had this to say:

"As to this matter, the Supreme Court of Mississippi said in Quan v. State, 185 Miss. 513, 188 So. 568, 569: 'We may concede, for the purposes of this case, (1) that everything of an inanimate or insensate nature seen, or which knowledge is acquired by or through the use of any of the five senses by the officers or those cooperating with them, during the course of an illegal search, is barred from being received in evidence; and (2) that any statements or conversations heard by the officers during the course of an illegal search * * * are likewise barred * * * and (3) there is also barred, as a matter of course, any statement made by the accused * * * .'"

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[25] *People* v. *Laino*, 10 N.Y.2d 161.

[26] 280 S.W.2d 37, 40-41.

"It is, of course, now settled law in federal courts that evidence is inadmissible not only when obtained during an illegal search, but if derived from information gained in an illegal search." [27]

Testimony of witnesses discovered and brought to light in the course of an illegal search of defendant's premises is excluded as the derivative of police illegality.[28]

The crystal clear summation of Circuit Judge Hamley illustrates the vice of allowing the convictions of petitioners to stand (R. 144-5):

"In my view the convictions should be set aside because as to both appellants the government developed its case on the basis of information obtained from Toy at his home immediately after enforcement officers made an illegal entry into that home. The fact that the information was derived from voluntary statements made by Toy at that time and place, rather than as a result of the seizure of physical objects (Silverthorne Lumber Co. v. United States, 251 U.S. 385) or observations made by law enforcement officers while illegally on the premises (McGinnis v. United States, 1 Cir. 227 F. 2d 598), seems to me immaterial.

"As I understand it, the test of the 'fruit of the poisonous tree' doctrine (Nardone v. United States, 308 U.S. 338) is whether the government seeks to avail itself of knowledge which it would not have had but for the lawless conduct of enforcement officers. For all that is shown in this record, the government would not have known of Johnnie Yee and so built its case had not an illegal entry of Toy's home been effected.

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[27] *United States* v. *Krulewitch*, 167 F.2d 943, 945 (C.A. 2).

[28] *People* v. *Martin*, 382 Ill. 192, 46 N.E.2d 997; *People* v. *Schmoll*, 383 Ill. 280, 48 N.E.2d 933; *People* v. *Albea*, 2 Ill.2d 317, 118 N.E.2d 277; *People* v. *Schaumloffel*, 53 Cal.2d 96, 346 P.2d 393; *People* v. *Mills*, 148 Cal.App.2d 392, 306 P.2d 1005.

"The guarantees of the Fourth Amendment are too fundamental to warrant hair-splitting distinctions between information based on physical evidence obtained or observations made at the scene of an illegal entry and information based on voluntary statements by the defendant at the scene of the illegal entry. The chances are always pretty good that law enforcement officers can obtain valuable leads during the course of adroit questioning. If such leads are not to be regarded as contaminated harvest, the 'fruit of the poisonous tree' doctrine will no longer serve its designed purpose of discouraging Fourth Amendment violations."

Professor Paulsen's succinct interpretation of the exclusionary rule is worthy of repetition:[29]

"The basic political problem of a free society is the problem of controlling the public monopoly of force. All the other freedoms, freedom of speech, of assembly, of religion, of political action, presuppose that arbitrary and capricious police action has been restrained. Security in one's home and person is the fundamental without which there can be no liberty. The exclusionary rule is the best and the most practical way for the law to deter those officials who would make inroads upon that security. It is morally right. It provides frequent opportunities for litigation of the issues. It is the best tool we have to give life to the constitutional safeguards against unreasonable interferences by the professional agencies of law enforcement."

In *McNabb* v. *United States*[30] this Court announced:

"Plainly, a conviction resting on evidence secured through such a flagrant disregard of the procedure which Congress

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[29] Professor Paulsen in Journal of Criminal Law, *supra*, at 264.

[30] 318 U.S. 332, 345.

has commanded cannot be allowed to stand without making the courts themselves accomplices in willful disobedience of law."

Summary of Argument

(Related Questions)

1.

Petitioners' Confessions Following Their Illegal Arrests Were Inadmissible as the Product of Their Illegal Arrests.

2.

The Confessions, Assuming They Were Properly Admissible in the Trial Were Not Sufficiently Corroborated by Other Independent Evidence as Required.

ARGUMENT

1.

All Illegally Obtained Evidence Is Inadmissible Because of the Fourth and Fifth Amendments.[31]

Petitioners' confessions made following their illegal arrest were inadmissible under the "fruit of the poisonous tree" doctrine, as products of their illegal arrests.

In *Nueslein* v. *District of Columbia*, *supra*, the Court was of the opinion that admissions stemming from an illegal arrest should be excluded from evidence. There the Court reasoned that "A confession does not make good a search illegal at its inception," citing *U. S.* v. *Setaro*, 37 F. 2d 134 (D.C. Conn.), and further: "This is part of the

[31] *Weeks* v. *United States*, 232 U.S. 383; *People* v. *Cahan*, 44 Cal.2d 434, 282 P.2d 905.

broader rule that an illegal search cannot be legalized by what it brings to light," citing *Byars* v. *U. S.*, 273 U.S. 28, and concluded: "That rule should not be narrowed even though an admission or confession is obtained."

This Court has ruled that the Fifth Amendment protects every person from incrimination by use of evidence obtained through search and seizure made in violation of the Fourth Amendment.[32]

In *People* v. *Macias*[33] while under arrest defendant admitted he had four marijuana cigarettes on his person. The Court said: "Thus coerced, he confessed. That 'confession was the immediate product of the unlawful arrest.'"

In *United States* v. *Arrington*,[34] the Court held:

"Thus, it is the rule that proof of a confession, made during a search, or contraband found as a result thereof cannot be relied upon in support of the legality of the search. By the same token, it would seem that the statement made by defendant in connection with the search could not be utilized as proof of consent (the sole premise relied upon as justifying the search)."[35]

A confession made following an illegal arrest is tainted "fruit of the poisonous tree". It is obtained in a manner through duress and coercion. In *Weeks*, *supra* (at 391-2) this Court made it clear that "The tendency of those who execute the criminal laws • • • to obtain convictions by

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[32] *Agnello* v. *United States*, 269 U.S. 20.

[33] 180 Cal. App.2d 193, 4 Cal. Rept. 256. See also *United States* v. *Watson*, 189 F.Supp. 776 (D.C. So. Dist. Cal.).

[34] 215 F.2d 630, 636 (C.A. 7).

[35] To same effect—*Takahashi* v. *United States*, 143 F.2d 118, 122 (C.A.9); *Worthington* v. *United States*, 166 F.2d 557, 566 (C.A. 6); *United States* v. *Pollack*, 64 F.Supp. 554, 558 (D.C.Dist. N.J.).

means of unlawful seizures and enforced confessions * * * should find no sanction in the judgments of the courts."

A confession made following an illegal arrest should be excluded as the product of an illegal arrest—the "fruit of the poisonous tree". It is contaminated by elements of duress, coercion and moral compulsion exerted upon a defendant while under the yoke and pressure of an illegal arrest, much as in the case of a drawn "consent" by a defendant to permit an agent to search his automobile or premises for evidence, extracted from the defendant while under illegal arrest.[36]

Consent to a search is in effect a waiver of the Constitutional protection of the Fourth Amendment.

Because consent involves waiver of basic constitutional rights:

"Courts indulge every reasonable presumption against waiver of fundamental constitutional rights." (*Johnson* v. *Zerbst*, 304 U.S. 458.)

McNabb v. *United States*,[37] as reaffirmed by *Mallory* v. *United States*[38] operates to exclude all confessions elicited during prolonged pre-commitment detention, whether or not they appear to be voluntarily made.

In *Mallory* this Court said (at 453) quoting in part from *McNabb*:

"* * * the Court held that police detention of defendants beyond the time when a committing magistrate was readily

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[36] *United States* v. *Kidd*, 153 F.Supp. 605 (D.C.W.D. La.); *People* v. *Wilson*, 145 Cal.App.2d 1, 7, 301 P.2d 974, 978; *Judd* v. *United States*, 190 F.2d 649, 651 (C.A.D.C.); *Channel* v. *United States*, 285 F.2d 217, 221 (C.A. 9).

[37] 318 U.S. 332.

[38] 354 U.S. 449.

accessible constituted 'wilful disobedience of law';" again (at 453) "the requirement of Rule 5(a) is part of the procedure devised by Congress for safeguarding individual rights."

In *McNabb* this Court affirmed (at 339):

" * * * a conviction * * * the foundation of which is evidence obtained in disregard of liberties deemed fundamental by the Constitution, cannot stand."

"Convictions following the admission into evidence of confessions which are involuntary, (i.e.) the product of coercion, either physical or psychological, cannot stand. This is so not because such confessions are unlikely to be true but because the methods used to extract them offend an underlying principle in the enforcement of criminal law. * * * the State must establish guilt by evidence independently and freely secured and may not by coercion prove its charge against an accused out of his own mouth." [39]

"The fact that the suspect was wrongfully detained, albeit lawfully arrested, is enough to exclude 'voluntary' incriminating statements. (Citing *Mallory* v. *United States*, 354 U.S. 449, 455 and *Upshaw* v. *United States*, 335 U.S. 410, 413.)

In the face of this development, * * * what still can be said for a federal rule which admits into evidence 'voluntary' statements elicited from a wrongfully arrested person —one whose detention is illegal, aye unconstitutional, ab initio?"

"McNabb (McNabb v. United States, 318 U.S. 332, 345) tells us that a conviction resting on evidence secured in violation of 'the procedure which Congress has commanded

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[39] Mr. Justice Frankfurter in *Rogers* v. *Richmond*, 365 U.S. 534, 540-41.

cannot be allowed to stand without making the courts themselves accomplices in willful disobedience of law.' How is it then, that convictions resting on damaging statements secured in violation of the procedure which the Constitution has commanded somehow can stand without involving the same federal courts in the same 'willful disobedience'? If it 'would stultify the policy which Congress has enacted into law to have federal convictions on incriminating statements obtained in violation of prompt pre-commitment rules, why does it not stultify the policy which the Constitution has enacted into law to base federal convictions on statements secured in violation of the Fourth Amendment?'"

"• • • it is far from disputed what the consideration underlying the McNabb-Mallory rule is. Thus, two experts on the rule (Hogan & Snee—The McNabb-Mallory Rule, 47 Geo. L.J. 1, 11, 12, 20 (1958)) • • • conclude that the 'real roots of the McNabb rule' are found in a refusal to countenance 'trials which are the outgrowth or fruit of the Government's illegality' since they 'debase the processes of justice.' Certainly this is one of the major considerations underlying the rule. To the extent that it is, to the extent that the rule does manifest the Court's desire to avoid 'contamination by plunging into the cesspool itself' unconstitutional police conduct obviously taints the administration of justice more than does merely illegal police conduct."[40]

As further pointed out by Professor Kamisar (at 112, Ill. Law Forum, *supra*):

"The issue, then, is not simply whether an illegal arrest renders an otherwise trustworthy confession untrustworthy

[40] Professor Yale Kamisar "Illegal Searches etc." U. of Ill. Law Forum, Vol. 1961, Spring, Number 1, at 140-142.

as a matter of law * * * but whether the courts should nevertheless exclude such a confession in order * * * to deter similar police illegality in the future or to avoid sanctioning the methods by which the evidence was obtained."

In *Rogers* v. *Superior Court*[41] the Court pointed out:

"There is a basic distinction between evidence seized in violation of the search and seizure provisions of the Constitution of the United States and the Constitution of California and the laws enacted thereunder, and voluntary statements made during a period of illegal detention. * * * Nevertheless, there is lacking the essential connection between the illegal detention and the voluntary statements made during that detention that there is between the illegal search and the evidence obtained thereby, or between the coercion and the confession induced thereby. The voluntary admission is not a necessary product of the illegal detention; the evidence obtained by an illegal search or by a coerced confession is the necessary product of the search or of the coercion."

By virtue of the Fourteenth Amendment, a confession is inadmissible in a capital crime where the defendant is denied assistance of counsel—a violation of a constitutional right.[42]

A confession following an illegal arrest likewise should be inadmissible since there has been a violation of a Constitutional right—Fourth Amendment.[43]

In *Miller* v. *United States*[44] this Court said:

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[41] 46 Cal.2d 3, 291 P.2d 929, 933.

[42] *Spano* v. *New York*, 360 U.S. 315.

[43] *Elkins* v. *United States*, *supra*; *Mapp* v. *Ohio*, *supra*.

[44] 357 U.S. 301.

"However much in a particular case insistence upon such rules may appear as a technicality that inures to the benefit of a guilty person, the history of the criminal law proves that tolerance of shortcut methods in law enforcement impairs its enduring effectiveness."

"Here, too, it should be remembered that 'officers should not be encouraged to proceed in an irregular manner on the chance that all will end well'; *Nueslein* v. *District of Columbia*, 115 F. 2d 690, 694 (C.A.D.C.) 1940 that police illegality 'is not to be made legal by what it turns up. In law it is good or bad when it starts and does not change character from its success.' *United States* v. *Di Re*, 332 U.S. 581, 595 (1948)."

2.

The Only Independent Evidence Aside From the Admissions, Declarations and Confessions of Petitioners Was Testimony of the Agent as to Finding Narcotics in Yee's House.

A confession of a defendant is not sufficiently corroborated by evidence of narcotics found in another person's home, to prove a charge of violation of 21 U.S.C. Sec. 174.[45]

The Court of Appeals in affirming the convictions erroneously concluded: "In this case the narcotics were found in the residence of Yee. This in itself establishes that someone was guilty of concealment and transportation of narcotics in violation of 21 U.S.C.A. Sec. 174" (R. 143).

In the *Landry* case, *supra*, the Court ruled that the finding of narcotics in the possession of a third person was not

[45] *United States* v. *Landry*, 257 F.2d 425 (C.A. 7); *Martin* v. *United States*, 264 F. 950 (C.A. 8).

sufficient corroboration of extra-judicial declarations or admission.

The statute[46] in part provides:

"Whenever on trial for a violation of this section the defendant is shown to have or to have had possession of the narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury."

The record is void of evidence to show petitioners to have or to have had possession of the narcotics so as to authorize a reliance upon the statutory presumption; this necessary element of proof could not be supplied by petitioners' admissions or confessions, but required independent evidence, which was lacking.

In the *Landry* case, *supra*, the Court explained:

"Cases are cited by the government in support of the principle that the admission of a crime is sufficient to support a conviction if it is corroborated by independent evidence of the corpus delicti. We see no point in this argument. Possession of a narcotic is not an offense. The statutory presumption which arises from unexplained possession is only a rule of evidence.

"Fact of possession may be shown by circumstantial evidence • • • but no court, so far as we are aware, has held that proof of possession by one person may be established by circumstantial evidence when the undisputed direct proof places that possession in some other person.

"The provision which raises a presumption of guilt from the fact of unexplained possession, and thereby in effect shifts the burden of proof to a defendant, is drastic, no

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[46] 21 U.S.C. 174.

doubt designed to meeting a menacing situation. Congress has created a presumption upon proof of the existence of a fact, and now the Government would have the Court presume the fact." [47]

Conclusion

We respectfully submit that the Court of Appeals erred in affirming the judgment of conviction of petitioners and said judgment of conviction of petitioners should be reversed.

Respectfully submitted,

Sol A. Abrams
Counsel for Petitioners
400 Montgomery Street
San Francisco 4, California

Dated: December 21, 1961

[47] See also *Naftsger* v. *United States*, 200 Fed. 494 (C.A. 8).

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1962

No. 36

WONG SUN and JAMES WAH TOY,

Petitioners,

—v.—

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

SUPPLEMENTAL BRIEF FOR PETITIONERS

EDWARD BENNETT WILLIAMS
(Appointed by this Court)

ROBERT L. WEINBERG
1000 Hill Building
Washington 6, D. C.

Counsel for Petitioners

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IN THE SUPREME COURT OF THE UNITED STATES

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Petitioners,

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UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

SUPPLEMENTAL BRIEF FOR PETITIONERS

Present counsel for petitioners, having been appointed by this Court subsequent to the filing of petitioners' brief on the merits, submits this supplemental brief for two purposes. First, while subscribing to the position and authorities set forth in petitioners' original brief, present counsel believes that he may facilitate his oral presentation of the case by outlining in this supplemental brief his views upon the posture in which the points are presented by this record. Insofar as feasible the supplemental brief will avoid repetition of the discussion and citations contained in the original brief, though these will of course be relied upon at oral argument. The second purpose of the supplemental brief is to amplify, by specific reference

to petitioners' statements, the discussion at pp. 28-30 of the original brief on the question of whether these statements together with the corroborative evidence were sufficient to sustain the convictions. The statements were not transmitted with the rest of the record from the court below and hence do not appear in the printed transcript of record prepared for this Court. The statements were subsequently transmitted to this Court and are printed as an appendix to this brief.

Questions Presented

In the view of present counsel the precise questions presented for decision upon this record may be stated as follows:[1]

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[1] These questions, it is submitted, are fairly contained within the questions presented in the Petition for Certiorari. Those questions were as follows:

"1. May federal agents avail themselves of knowledge obtained by them from statements made by a defendant following an illegal arrest? Is the use of such knowledge by the federal agents and the admission in evidence against the defendants of narcotics found by the agents as the result of the knowledge thus gained by them, a violation of the 'fruit of the poisonous tree' doctrine laid down by the United States Supreme Court in *Silverthorne Lumber Co.* v. *United States*, 251 U.S. 385, 40 S. Ct. 182, and *Nardone* v. *United States*, 308 U.S. 338, 60 S. Ct. 266?

"2. May the Government use in its prosecution against a defendant illegally arrested a confession made by the defendant following such an illegal arrest?

"3. Is such a confession sufficiently corroborated by the defendant's statements made in his premises to the federal agents immediately after his arrest and evidence of narcotics found in another person's home by the agents as the result of knowledge obtained by them from such statements?

"4. Is a search for and seizure of narcotics at a place distant from the place of arrest authorized?". (Pet. 2-3.)

The grant of certiorari (R. 147) was not limited.

1. Do the Fourth and Fifth Amendments require, or should this Court in the exercise of its supervisory powers require, the exclusion of any or all of the following items of evidence obtained through the invasion of petitioners' premises and the arrest of petitioners without probable cause:

(a) An incriminating declaration made by petitioner Wah Toy to narcotics agents at the time of his illegal arrest.

(b) Narcotics obtained by the agents from the home of the alleged co-conspirator Yee as a result of information contained in Wah Toy's incriminating declaration.

(c) Incriminating statements, alleged to constitute confessions, obtained as a result of narcotic agents' interviews with petitioners subsequent to their unlawful arrests, where there has been no showing by the government that the statements were not the product of the unlawful arrests or of information obtained thereby.

2. (a) Was petitioner Wah Toy entitled to a judgment of acquittal on the charge that on or about June 1, 1959 he knowingly transported and concealed heroin with knowledge that it had been illegally imported, because the statement alleged to constitute his confession omitted, and the corroborative evidence did not supply, three elements of the offense charged: that the transportation and concealment of heroin was knowing, that petitioner had knowledge of the illegal importation (or possession from which such knowledge might be statutorily presumed), and that the act of transportation and concealment took place on or about June 1, 1959.

(b) Was the petitioner Wong Sun entitled to a judgment of acquittal on the same charge, because the statement

alleged to constitute his confession did not admit knowledge that the heroin had been illegally imported and the corroborative evidence did not establish such knowledge (or the possession from which it might be statutorily presumed), and the heroin whose concealment was relied upon to corroborate the alleged confession was not shown to be the same heroin which the statement described.

ARGUMENT

I.

Declarations, Tangible Evidence and Alleged Confessions Obtained as a Result of the Violation of Fourth Amendment Rights Should Have Been Excluded From Evidence.

Each of the petitioners was subjected to three distinct violations of his Fourth Amendment rights. The amendment guarantees the security of his person, his dwelling, and his effects.[2] Each of these three guarantees was violated as to each of the petitioners. Petitioner Wah Toy's premises[3] were invaded (R. 37-39, 51-53) without a warrant or probable cause, he was arrested (R. 47, 52-53, 65) without a warrant or probable cause, and his premises were searched (R. 47, 65-66) without a warrant or incident to a valid arrest. Similarly petitioner Wong Sun's premises were invaded (R. 81-89, 96-99) without a warrant or probable cause, he was arrested (R. 84, 88, 97) without a warrant or probable cause, and his premises were searched (R. 85, 89, 99) without a warrant or incident to

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[2] "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . ." U. S. CONST. amend. IV.

[3] Wah Toy's premises included both a store and a dwelling (R. 33, 37, 42-43). The agents entered through the store and continued into the dwelling (R. 51-52).

a valid arrest.[4] Of these six violations of petitioners' Fourth Amendment rights, three are significant here because of the evidence obtained by the government as a result thereof. Those three are the invasion of petitioner Wah Toy's premises, the unconstitutional seizure of his person accomplished by placing him under arrest without warrant or probable cause, and the similarly unlawful seizure of petitioner Wong Sun's person. As a result of the first two of these violations, government agents obtained an incriminating declaration from Wah Toy that he had seen narcotics at Johnny's house the night before (R. 63), and acting upon such information the government obtained the narcotics from the alleged co-conspirator Johnny Yee (R. 63-64). Both Wah Toy's declaration and the narcotics themselves were admitted into evidence over objection (R. 31-33, 62-64, 100-106). The second of the violations, i.e., the unlawful seizure of Wah Toy's person, also resulted in the government's obtaining from him a statement alleged to constitute a confession (Gov. Ex. 3, App. 27-28, *infra*). Similarly the third violation, i.e., the unlawful seizure of Wong Sun's person (which itself was the result of information obtained through Wah Toy's unlawful arrest, see R. 90-96), resulted in the government's obtaining a statement alleged to constitute a confession by Wong Sun (Gov. Ex. 4, App. 29-30, *infra*). Both statements were admitted into evidence over objection (R. 100-106).

The foregoing contention, that the arrest of each petitioner without warrant or probable cause constituted a "seizure" of the person in violation of the Fourth Amendment, may call for slight elaboration. While it is a familiar concept that the Fourth Amendment prohibits unlawful

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[4] In the case of both petitioners the absence of search and arrest warrants was conceded (R. 55, 89); the want of probable cause was established by the holding of the Court of Appeals (R. 139-40).

invasion of houses and seizure of effects, it is less common to characterize an unlawful arrest as a "seizure" of the person in violation of the Fourth Amendment. Protection against such seizure, however, is patently as important an object of the Fourth Amendment as the protection of houses and effects, and is so recognized by the decisions of this Court. In *Giordenello* v. *United States*, 357 U.S. 480, 485-86, the Court held that an arrest with a warrant issued without probable cause constituted a violation of the Fourth Amendment. The *a fortiori* proposition, that an arrest without a warrant and without probable cause constitutes a Fourth Amendment violation, is established by *Henry* v. *United States*, 361 U.S. 98, 100-102. See also *Monroe* v. *Pape*, 365 U.S. 167, 170-71. The Fourth Amendment quite literally proscribes unlawful seizure of the person.[5] "The Amendment protects people against the seizure of their persons as well as against the search of their houses." *Wrightson* v. *United States*, 222 F. 2d 556, 559 (D.C. Cir. 1955), per Prettyman, *J.* "The Fourth Amendment makes protection of the individual against illegal seizure or arrest a constitutional imperative." *Bynum* v. *United States*, 262 F. 2d 465, 467 (D.C. Cir. 1958), per Hastie, *J.*, sitting by designation. See also *Nueslein* v. *District of Columbia*, 115 F. 2d 690, 693 (D.C. Cir. 1940) (police officers violated defendant's Fourth Amendment rights "by unlawfully coming into his home and by placing him in custody"), per Vinson, *J.*, as he then was.

Both *Giordenello* and *Henry*, *supra*, presented the common situation where the existence of probable cause for an arrest is in issue because the government seeks to

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[5] The Amendment in terms guarantees "[t]he right of the people to be secure in their persons . . . against unreasonable searches and seizures" and requires that a warrant particularly describe "the persons or things to be seized."

validate a successful search as incident to the arrest. Those cases, unlike the instant one, present no question of excluding the fruits of an unlawful arrest as such; once the arrest is held invalid the disputed evidence must be excluded as the fruits of an unconstitutional search. The instant case, however, presents the situation where searches incident to arrests do not themselves yield fruits, while the arrests do. The question is therefore whether products of an arrest, rather than of a search incident thereto, should be excluded from evidence.

To the extent that the government in the instant case obtained evidence as a result of the violation of petitioners' Fourth Amendment rights to be secure in their persons and their homes, the exclusion of such evidence is constitutionally[6] required under *Mapp* v. *Ohio*, 367 U.S. 643.

> "'. . . [T]he Fourth Amendment, although not referring to or limiting the use of evidence in courts, really forbade its introduction *if obtained by government officers through a violation of the Amendment.*'" *Id.* at 649, quoting discussion in *Olmstead* v. *United States*, 277 U.S. 438, 462 of the rule of *Weeks* v. *United States*, 232 U.S. 383. (Emphasis supplied.)

Even if the Court should decide in the instant case that the obtaining of any of the challenged evidence was not so causally related to the Fourth Amendment violations that it can be deemed "obtained by government officers through a violation of the Amendment", the Court may nevertheless exclude it in the exercise of its supervisory powers. The exercise of such powers over the conduct of

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[6] The opinion of Justice Clark in *Mapp* v. *Ohio*, *supra*, rests the federal exclusionary requirement primarily upon the Fourth Amendment, partially upon the Fifth. The concurring opinion of Justice Black stresses the interrelationship of the Fourth and Fifth Amendment grounds.

federal law enforcement officers, *cf. Rea* v. *United States*, 350 U.S. 214, *Mallory* v. *United States*, 354 U.S. 449, may make such exclusion a proper sanction to deter the practice of unlawful arrest. The evidence here challenged would not have been obtained without the violation of the requirements for arrest prescribed by Congress in 26 U.S.C. § 7607, as well as those of the Fourth Amendment.[7]

> "... [I]n *McNabb* v. *United States*, 318 U.S. 332 ... it was held that 'a conviction resting on evidence secured through such a flagrant disregard of the procedure which Congress has commanded cannot be allowed to stand without making the courts themselves accomplices in willful disobedience of law.' 318 U.S., at 345. Even less should the federal courts be accomplices in the willful disobedience of a Constitution they are sworn to uphold." *Elkins* v. *United States*, 364 U.S. 206, 223.

The rationale of the exclusionary rule has been extensively discussed in petitioners' previous brief, and need not be further elaborated here. For a far-ranging discussion with special reference to the unlawful arrest problem, see Kamisar, *Illegal Searches or Seizures and Contemporaneous Incriminating Statements: A Dialogue on a Neglected Area of Criminal Procedure*, U. ILL. L. F. (1961) 78-147.

There remains to consider with respect to each of the items of evidence here challenged, whether it was evidence "obtained by government officers through a violation of the [Fourth] Amendment" so as to require its exclusion under

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[7] *Henry* v. *United States*, *supra*, equates with the constitutional requirement of probable cause the statutory requirement that an arrest without warrant be upon "reasonable grounds to believe that the person to be arrested has committed or is committing" a felony, 18 U.S.C. § 3052. The quoted statutory phraseology also appears in 26 U.S.C. § 7607, the statute pursuant to which the arresting agents purported to act in the instant case.

Mapp, or alternatively was sufficiently the product of unlawful conduct by government agents to warrant its exclusion in the exercise of the Court's supervisory powers.

1. *The incriminating declaration by petitioner Wah Toy at the time of his illegal arrest.*

The government proved through the testimony of agent Nickoloff that, when Wah Toy was placed under arrest and first questioned by agent Casey, Wah Toy stated that he knew somebody who had been selling narcotics. Wah Toy named this person as "Johnny", described the location of Johnny's house and bedroom, said that he had been there the night before and that Johnny had "about a piece" of "stuff" (R. 63). This evidence as to petitioner Wah Toy's declaration was obtained by agent Nickoloff immediately after the unlawful invasion of petitioner's premises and the placing of petitioner under unlawful arrest. Nickoloff's presence and petitioner's availability for questioning both having resulted from Fourth Amendment violations, the declaration must reasonably be considered evidence "obtained by government officers through a violation of the Amendment". Nor can it be contended any longer that oral declarations are not within the Fourth Amendment's protection against unlawful "seizure". Any doubt on this point was resolved by this Court's decision in *Silverman* v. *United States*, 365 U.S. 505.

An incriminating declaration secured under similar circumstances, by police officers who unlawfully entered defendant's home and placed him in custody,[8] was held inadmissible on Fourth Amendment grounds in *Nuslein* v. *District of Columbia*, *supra*. See also *Rickards* v. *State*,

[8] It appears from the opinion in *Nuslein* that the incriminating declaration was made after the officers' unlawful entry but before they placed the defendant in custody. See 115 F. 2d at 691.

6 Terry 573, 77 A. 2d 199 (1950), the case in which the Supreme Court of Delaware adopted the federal exclusionary rule. In *Rickards* the defendant had been illegally arrested, in violation of a State constitutional guarantee substantially the same as the federal Fourth Amendment, and was convicted of drunken driving with the aid of police officers' testimony as to declarations made by the defendant while under unlawful arrest. The conviction was reversed and the evidence held inadmissible because "obtained by a violation of constitutional guarantees". Cf. *Bynum* v. *United States*, *supra*, where in order to impose "effective sanctions implementing the Fourth Amendment guarantee against illegal arrest and detention" (*id.* at 469), the court required exclusion from evidence of fingerprints taken from defendant when he was booked immediately after an unlawful arrest.

Neither the opinion below nor the government's Brief in Opposition to Certiorari specifically discusses the admissibility in evidence of the foregoing declaration of Wah Toy. Both discuss the declaration in the context of whether the government's use of the information which it contained in discovering the narcotics (Gov. Ex. 1) rendered the latter inadmissible. (R. 141-42; Brief in Opposition to Certiorari, pp. 7-8.) The validity of the government's argument on this point is considered in subsection 2, *infra*. But even if the narcotics be held admissible notwithstanding the government's use of the "lead" contained in the declaration, petitioners submit that the testimony as to the contents of the declaration should still have been excluded as the product of Fourth Amendment violations.

The improper admission into evidence of Wah Toy's post-arrest declaration in itself requires reversal of the convictions herein. The declaration was admitted as evidence on the merits (R. 62-63), not on the voir dire to

determine the admissibility of the seized narcotics. The declaration was relied upon as corroborative evidence of the alleged confessions by the court below (R. 143) and in the Brief in Opposition to Certiorari, p. 5. It appears also to have been a material factor in the verdict of the trial court, for it was cited by the prosecutor (R. 116-117) in the course of the argument which led the court (R. 118) to reverse its previously expressed view: "I think this evidence does not go to prove the substantive offense as charged." (R. 107.)[9]

Since the declaration was apparently considered as corroborative evidence against Wong Sun as well as Wah Toy,[10] its erroneous admission requires the reversal of both convictions.

2. *Tangible evidence found as a result of Wah Toy's declaration.*

The narcotics (Gov. Ex. 1) which constituted the principal evidence relied upon to corroborate petitioners' al-

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[9] The reversal of position on the substantive count (count 2) was accompanied by a reversal in the opposite direction on the conspiracy count (count 1). The court expressed the intention to find the defendants guilty of the conspiracy (R. 107), but apparently was persuaded by the prosecutor's subsequent argument that the sufficiency of the evidence on that count was more questionable than on the substantive count (R. 107-108, 118).

[10] Neither the opinion below (R. 143) nor the prosecutor's argument (R. 116-17) suggests that the declaration was to be considered only against Wah Toy. Nor was its use so restricted when admitted (R. 62-63). The Brief in Opposition to Certiorari relies on the declaration as corroborative evidence for both petitioners' confessions:

> "The finding of the narcotics in Yee's house (to which petitioners admitted bringing them) *and in the exact place where Toy said they would be*, corroborated *petitioners'* admissions that they had transported and possessed the narcotics." *Id.* at 5. (Emphasis supplied.)

leged confessions, were obtained by narcotics agents from the alleged co-conspirator Yee as a result of the information given to the agents by Wah Toy's declaration immediately after his illegal arrest. The question is presented whether narcotics so obtained are inadmissible under the "fruit of the poisonous tree" principle.

Here, unlike some "fruit of the poisonous tree" cases, there is no contention that the government may have learned of the challenged evidence from an independent source rather than from the unlawfully obtained information. The government has frankly conceded: "The narcotics found in Yee's house which corroborate the confessions were discovered as a result of statements made by Toy at the time of his arrest." (Brief in Opposition to Certiorari, p. 6.) Similarly the prosecution stated below: "We would not have found these drugs except that Mr. Toy helped us to." (R. 117.) If, therefore, Wah Toy's revealing declaration was obtained through a violation of the Fourth Amendment, the narcotics should be held inadmissible because they were concededly the "fruit" of this unlawfully obtained information. Cf. *Nardone* v. *United States*, 308 U.S. 338; *Silverthorne Lumber Co.* v. *United States*, 251 U.S. 385.

The government, however, argues that the narcotics cannot "be considered so directly the fruits of the illegal arrest as to be inadmissible in evidence." (Brief in Opposition to Certiorari, pp. 7-8.) The government reasons that Wah Toy's statement to the arresting agents was "an intervening act of will by the arrested person", and that "before the narcotics were obtained by the agent there was, in addition to Toy's statement, the further intervening voluntary act of Yee in turning over the narcotics." (*Id.*

at p. 8.)[11] Even assuming that there would be validity to the government's theory that intervening voluntary declarations or acts may purify the fruits of the original unlawful arrest, no such finding of voluntariness was[12] or can be made on this record. The burden upon the government to show that Wah Toy's declaration while under illegal arrest was voluntary can be no less than the burden which the government assumes when it seeks to show a waiver of Fourth Amendment rights by one under arrest voluntarily consenting to a search. The burden in the latter situation has been stated as follows by the court below, following the leading case of *Judd* v. *United States*, 190 F. 2d 649 (D.C. Cir. 1951):

> "A search and seizure may be made without a search warrant if the individual freely and intelligently gives his unequivocal and specific consent to the search, uncontaminated by any duress or coercion, actual or implied. *The Government has the burden of proving by clear and positive evidence that such consent was given.* Judd v. United States, 89 U.S. App. D.C. 64, 190 F. 2d 649, 650." *Channel* v. *United States*, 285 F. 2d 217, 219-20 (9th Cir. 1960). (Emphasis supplied.)

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[11] A similar rationale was adopted by the court below in rejecting appellants' reliance upon the "fruit of the poisonous tree" doctrine (R. 141-42).

[12] Since the government's present theory was not urged in the trial court, and the trier of fact apparently rejected the contention that the invasion of Wah Toy's premises and his arrest were unlawful, he presumably found it unnecessary to make findings on the voluntariness of the post-arrest declaration. Even if the trier of fact had affirmatively found that Toy made his declaration voluntarily, the finding would have to be reconsidered because of its failure to take into account the coercive factor of unlawful arrest.

In *Judd, supra*, the court also stated:

> "Intimidation and duress are almost necessarily implicit in such situations; if the Government alleges their absence, it has the burden of convincing the court that they are in fact absent.
>
> "*This burden on the Government is particularly heavy in cases where the individual is under arrest.* Non-resistance to the orders or suggestions of the police is not infrequent in such a situation; true consent, free of fear or pressure, is not so readily to be found." 190 F. 2d at 651. (Emphasis supplied.)

When as in the instant case defendant is not merely under arrest but under unlawful arrest or detention, the consent may be deemed involuntary as a matter of law even if the government can meet the heavy burden imposed by *Judd, supra*. See *Watson* v. *United States*, 249 F. 2d 106 (D.C. Cir. 1957), where the *Judd* court held it unnecessary to determine whether the government had met its burden on showing voluntary consent because the fact that the consent was obtained while defendant was under unlawful detention rendered the consent involuntary as a matter of law. See also *United States* v. *Dixon*, 117 F. Supp. 925 (N.D. Cal. 1949), in which the same district court that tried the instant case held invalid as a matter of law a consent obtained while defendant was under illegal arrest.

The second half of the government's argument on "intervening voluntary acts", viz. that Yee surrendered the narcotics voluntarily, likewise founders on the foregoing test of *Channel* and *Judd*. The conclusionary testimony of the narcotics agent that Yee "surrendered" the narcotics (R. 64, 90) is hardly sufficient to meet the burden imposed under *Channel* and *Judd* where the government contends that submission to a search and seizure was voluntary.

More fundamental than the lack of record support for the government's theory on "interveping voluntary acts" is the erroneous interpretation of the "fruit of the poisonous tree" doctrine which the government's theory appears to assume. The government apparently regards the applicable test in applying the "fruit of the poisonous tree" concept as whether the challenged evidence "can be considered so directly the fruits of the illegal arrest as to be inadmissible in evidence" (Brief in Opposition to Certiorari, pp. 7-8). But the established test is not one of directness versus indirectness of causation. Rather, once the defendant has shown that the government unlawfully obtained information, then "the burden falls upon the prosecution to prove that the information so gained has not led, *directly or indirectly*, to the discovery of any of the evidence which it introduces." *United States* v. *Coplon*, 185 F. 2d 629, 636 (2d Cir. 1950), certiorari denied, 342 U.S. 920. (Emphasis supplied.)

> "Here, as in the Silverthorne Case, the facts improperly obtained do not 'become sacred and inaccessible. If knowledge of them is gained from an independent source they may be proved like any others, but the knowledge gained by the Government's own wrong cannot be used by it' simply because it is used derivatively. 251 U.S. 385, 392." *Nardone* v. *United States*, 308 U.S. 338, 341.

In order to present admissible proof of the facts of which knowledge was improperly obtained, *Nardone* requires that the government "convince the trial court that its proof had an independent origin." *Ibid.* In the instant case it appears conceded that no such independent origin was or could have been shown.

Petitioners believe that the "fruit of the poisonous tree" principle applied to violations of the wiretapping statute

must apply with at least equal force to violations of the Fourth Amendment. *Nardone's* reliance on *Silverthorne*, a Fourth Amendment case, strongly suggests that this belief is warranted. In *Silverthorne*, *supra*, this Court held invalid under the Fourth Amendment a subpoena for documents of whose existence the government had learned by means of a previous unreasonable search and seizure. Although the subpoena appeared valid on its face, it was struck down because

> "The essence of a provision forbidding the acquisition of evidence in a certain way is that not merely evidence so acquired shall not be used before the court, but that it shall not be used at all. . . . the knowledge gained by the government's own wrong cannot be used by it in the way proposed." 251 U.S. at 392.

Assuming *arguendo* that the government's seizure of the narcotics from Yee was predicated upon the latter's voluntary consent, the government's position can be no stronger than if it had instead used the information obtained from Wah Toy to secure a search warrant for Yee's premises. Such a warrant would be analogous to the subpoena held invalid in *Silverthorne*: here too the government would have been using knowledge obtained through a previous violation of the Fourth Amendment to secure ostensibly legal process for seizing the evidence of which it had improperly learned.

Since the narcotics should have been excluded from evidence as the "fruit of the poisonous tree", there was insufficient admissible evidence to corroborate petitioners' alleged confessions and they were entitled as a matter of law to judgment of acquittal on count 2.

3. *The alleged confessions of petitioners.*

A similar application of the "fruit of the poisonous tree" principle requires the exclusion from evidence of the statements which were alleged to constitute petitioners' confessions. Agent William Wong testified that he had prepared the statements from discussions with Wah Toy on June 5 and 9 and with Wong Sun on June 9 (R. 66-72). Wong stated that each of the petitioners had acknowledged that the information contained in his statement was true but had refused to sign it (R. 69-70, 72). The statements thus prepared by agent Wong were the result of the information and evidence obtained through the previous Fourth Amendment violations. Agent Wong testified that his conversation with Wah Toy concerned the specific narcotics which the government had obtained from Yee and introduced as Exhibit 1 at trial (R. 66-67). If, as argued above, these narcotics were unlawfully obtained, the petitioners' subsequent statements to agent Wong about the narcotics were fruits of the same illegal conduct. It would undermine the purpose and effect of the exclusionary rule to bar the narcotics from evidence but admit the agent's testimony as to petitioners' statements concerning the narcotics.[13]

There can be little doubt that, in interviewing petitioners, agent Wong[14] also made use of the information which had been obtained from petitioners during their

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[13] It may, however, be found unnecessary to determine this issue, since the exclusion of the narcotics would leave the statements without essential corroborative evidence.

[14] Agent Nickoloff was present with agent Wong at at least one of the interviews (see R. 71). Agent Wong is not to be confused with petitioner Wong Sun, nor with another agent having the same last name, Alton Wong, whose testimony appears at R. 51-53.

period of unlawful arrest.[15] However, since the government was permitted to put the unsigned statements themselves in evidence, instead of eliciting the full conversation which agent Wong claimed to have had with the petitioners, the full contents of such conversations are not in the record.[16] Apart from the agent's use of illegally obtained information and evidence in preparing petitioners' statements, such statements are "fruit of the poisonous tree" in an even more direct sense. Had it not been for the unlawful seizure of petitioners' persons, they would never have been subjected to the interviews at all. *Bynum* v. *United States, supra,* is authority that evidence which would not have been obtained but for an unlawful arrest must be excluded. In *Bynum* this evidence consisted of a set of fingerprints taken during the period of illegal arrest, and its admission was held reversible error notwithstanding that the gov rnment had other sets of By-

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[15] The record indicates that on the morning of his arrest (June 4) Wah Toy was questioned both at his home (R. 63, 94) and at the Narcotics Bureau offices (R. 90-91, 94), and was then taken with the agents to point out Wong Sun's house (R. 92-93, 95). Information obtained from Wah Toy by agents on any or all of these occasions may have been used at the interviews on June 5 and June 9. The record does not show the extent if any to which Wong Sun was questioned at or after his arrest on June 4, but there was presumably opportunity to question him during the hour he was kept handcuffed in the living roo . while agents searched the premises following his arrest (see R. 84-85, 88-9).

[16] The court below held: "While this does not appe r to be the usual method of introducing statements of defendants, we cannot say that the defendants were prejudiced thereby." (R. 143.) Petitioners will nevertheless have been prejudiced by the unusual procedure if the absence of the full conversation from the record prevents them from contending that such conversation must have included references by the questioner to information obtained during petitioners' unlawful arrest. But it is petitioners' position that the government has the burden of proving the absence of such references in order to render the statements admissible.

num's fingerprints which it could have introduced instead.[17] In view of the absence from this record of any evidence that the government would have sought and succeeded in obtaining interviews with petitioners absent their unlawful arrest, the government has not met the *Nardone* requirement that it "convince the trial court that its proof had an independent origin."[18]

Since the government's case concededly rested primarily upon the alleged confessions (Brief in Opposition to Certiorari, p. 5), their exclusion would have compelled judgments of acquittal on count 2.

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[17] It may be observed that a usable set of fingerprints could probably not have been obtained from Bynum without cooperation on his part. The voluntariness of the arrestee's conduct did not avoid the application of the exclusionary rule.

[18] The government did not even attempt to show that the status of illegal arrest was terminated at some time prior to the interviews by bringing petitioners before a commissioner in accordance with the requirements of Rule 5, Fed. R. Crim. P., and securing a determination from the commissioner that there was probable cause to warrant their continued detention. The record is silent as to the time or substance of any proceedings before the commissioner. This is not a situation where a defendant, seeking to invoke the *McNabb-Mallory* rule, has the burden of showing delay in his appearance before the commissioner in order to claim that an initially legal detention subsequently became illegal because of a violation of Rule 5. Here the petitioners have established that their detention was illegal *ab initio*, and it was for the government to mitigate the effect of this showing, if it was so disposed, by attempting to prove compliance with Rule 5.

II.

The Alleged Confessions and the Corroborative Evidence Were Insufficient to Sustain the Convictions.

Even assuming the government's evidence all to have been admissible, petitioners submit that such evidence together with their alleged confessions was insufficient to sustain a conviction. The court below held (R. 142-43) that the convictions were sustainable under *Smith* v. *United States*, 348 U.S. 147. *Smith* held that "corroboration is necessary for all elements of the offense established by admissions alone," and that "All elements of the offense must be established by independent evidence or corroborated admissions, but one available mode of corroboration is for the independent evidence to bolster the confession itself and thereby prove the offense 'through' statements of the accused." *Id.* at 156, quoted at R. 142-43.

Petitioners submit that the convictions cannot stand under the standard prescribed by *Smith*, and further that an even stricter standard is properly applicable to the statements relied upon by the government in the instant case. In *Smith* the statement introduced against the defendant was a signed work product of himself and his accountant, prepared without any assistance of federal agents. In the instant case, petitioners' statements were admittedly the work product of a narcotics agent who prepared them on the basis of his interviews with petitioners (R. 67-72). Both petitioners refused to sign their statements (R. 69, 72), although the narcotics agent who prepared the statements testified that each petitioner acknowledged his statement to be correct (R. 69, 72). A statement prepared in this manner, petitioners contend, should require far more "bolstering" by independent evidence than a statement carefully prepared by a defendant and his professional

adviser as in *Smith*. Particularly is this the case where, as here, the statements of the petitioners are obviously conflicting. Indeed, it is difficult to perceive how the trier of fact could have convicted both petitioners primarily on the basis of their respective statements, when it is apparent from a comparison of the statements that both could not be true. Nor may an inconsistent verdict by a judge, unlike a jury, be allowed to stand. *United States v. Maybury*, 274 F. 2d 899 (2d Cir. 1960).

A. The Statement of Petitioner Wah Toy and the Corroborative Evidence.

It seems to have been assumed by the courts below that Wah Toy's statement (Gov. Ex. 3, App. 27, *infra*) constituted a "confession" of the offense charged in count 2.[19] However, a careful reading of the statement indicates that, while undoubtedly incriminating, it does not amount to a confession of the offense charged[20] since it does not admit all the elements thereof. First, it does not admit that Toy "fraudulently" or "knowingly" transported (let alone concealed) any narcotics. It admits that Wah Toy drove Wong Sun to Yee's house on a number of occasions, and some-

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[19] Whether the statement constituted a confession to the conspiracy charged in count 1 need not be considered in view of petitioners' acquittal on that count.

[20] Count 2 charged as follows:

> "On or about June 1, 1959, in the City and County of San Francisco, State and Northern District of California, the defendants Wong Sun and James Wah Toy did fraudulently and knowingly conceal, transport and facilitate the transportation and concealment of a narcotic, to wit, heroin, then and there knowing the same to have been transported and brought into the United States contrary to law." (R. 5.)

The judgments of conviction (R. 124, 126) adjudged petitioners guilty of concealing and transporting the narcotic as charged; they did not rest upon that part of the charge which alleged facilitating transportation and concealment.

times received heroin there from Yee; but it does not say that on these trips Wah Toy knew that Wong Sun was transporting narcotics, or that Wah Toy himself knowingly transported them or in any way concealed them. Thus the element of "knowledge" (or alternatively "fraud") with respect to the transportation and concealment could not have been established by Wah Toy's statement.

A second element of the offense lacking from Wah Toy's alleged confession was knowledge that the narcotics had been illegally imported. The statement contains no admission of such knowledge, notwithstanding that the statement was prepared by a narcotics agent on the basis of his questioning of petitioner (R. 67-68) and so doubtless would have included such an admission if the agent had been able to elicit one. Nor can the element of knowledge of illegal importation be supplied by a statutory presumption arising from proof of possession, as 21 U.S.C. § 174 permits, since the statement does not say that Wah Toy ever physically possessed the heroin which was the subject of count 2. The small amount of heroin which Wah Toy admitted that Yee gave him does not appear to have been the same heroin whose transportation and concealment on or about June 1, 1959 was the subject of count 2.[21] Even if the statement could be read to admit possession of the heroin involved in count 2, there was no corroborative evidence of either Wah Toy's knowledge that the heroin was illegally imported or of his possession of the heroin.

A third element wanting in Wah Toy's statement is that of the time of the offense. The charge in count 2 is that the transportation and concealment by Wah Toy and Wong Sun took place "on or about June 1, 1959" (R. 5). In

[21] Wah Toy's statement said that Yee was Wah Toy's "connection", not vice versa. Thus Wah Toy would be receiving narcotics from Yee rather than transporting them to Yee, insofar as the statement is concerned.

view of the numerous deliveries of heroin which (if the statements should be believed) Yee appears to have received on different dates, the date of the particular delivery charged in count 2 was obviously a matter of importance. It seems apparent from the prosecutor's examination of his witness Yee, that Yee had told the government of a delivery on June 1, 1959, and that the government intended to prove the transportation and concealment incident to this delivery through the testimony of Yee. (See R. 20-22, 28-30; *cf.* R. 90.) However, Yee repudiated his previous statement to the government, testifying that he had "lied to that" when he had stated: "on Monday, June 1, 1959, prior to midnight, both James Toy and Wong Sun came to my house" (R. 30). The government claimed "surprise" at Yee's failure to testify in accordance with his previous statement (R. 28). This surprise, however, does not permit the allegation "on or about June 1, 1959" to be construed to embrace an act of transportation and concealment on "last Tuesday, May 26, 1959", the last occasion on which Wah Toy's statement admitted taking Wong Sun to Yee's house.[22] Nor can it be said that Wah Toy was being sufficiently imprecise in his statement so that May 26 might have meant "on or about June 1". The statement was based on interviews conducted only a few days after the event, on June 5 and 9, 1959 (R. 67), and the language in the statement, "last Tuesday, May 26, 1959", is plainly meant to refer to that date and no other.[23] The statement

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[22] The statement reads: "The last time I drove Wong Sun out to Yee's house was last Tuesday, May 26, 1959." (App. 27, *infra*.) The only subsequent visit to Yee's admitted by Wah Toy in the statement was on June 3, 1959. As to this visit the statement says that Wah Toy was coming to Yee's without "anything" and does not mention the accompaniment or presence of Wong Sun.

[23] This part of the statement was probably based on the June 5 interview, since the agent would not have written "last Tuesday, May 26, 1959" if the interview was on Tuesday, June 9, 1959. "Last Tuesday" would then have been June 2.

itself therefore cannot be the basis for a finding that Wah Toy transported and concealed narcotics "on or about June 1, 1959." And there was no independent evidence which showed that Wah Toy had transported narcotics to Yee's house on June 1, 1959, as it seems Yee had originally told the government.

Upon the evidence herein, the government cannot be said to have satisfied either aspect of the test laid down in *Smith* v. *United States, supra.* The requirement in *Smith,* that "All elements of the offense must be established by independent evidence or corroborated admissions . . ." was not met, because the three elements discussed above were not established either by independent evidence or corroborated (or even uncorroborated) admissions. Even if those three elements had been present in the statement, the requirement of *Smith* that "Corroboration is necessary for all elements of the offense established by admissions alone" was not satisfied. None of the three elements was corroborated by the evidence relied upon by the government and the court below.[24] The motion for judgment of acquittal on count 2 (R. 118) should therefore have been granted as to petitioner Wah Toy.

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[24] The corroborative evidence was set forth as follows by the court below (R. 143):

> "In this case the narcotic was found in the residence of Yee. This in itself establishes that someone was guilty of concealment and transportation of narcotics in violation of 21 U.S.C.A. § 174. This narcotic was introduced into evidence. The advance statement of Toy that narcotics could be expected to be found in Yee's house, and that he was familiar with that house and the place where the narcotic was stored, together with the subsequent admissions of Toy and Wong Sun that they had brought the narcotic to Yee's house, amount to sufficient evidence to support the conviction."

The government's view of the extent of the corroborative evidence appears at p. 5 of the Brief in Opposition to Certiorari.

B. The Statement of Petitioner Wong Sun and the Corroborative Evidence.

While Wong Sun's statement (Gov. Ex. 4, App. 29-30, *infra*) comes closer than Wah Toy's to constituting a confession of the offense charged in count 2, two essential elements of the offense remain uncorroborated. The statement reveals no knowledge on Wong Sun's part that the narcotics were illegally imported, although as noted above the narcotics agent taking the statement (R. 71-72) would have elicited an admission of such knowledge if he possibly could have done so. Assuming that the admission that Wong Sun briefly had possession of the narcotics which were taken to Yee's "About 4 days before" June 4, 1959, is sufficient to invoke the statutory presumption of knowledge as to the narcotics which are the subject of count 2, there is no corroborative evidence showing either the knowledge of illegal importation or the possession from which such knowledge might be presumed.[25]

There is also a serious question as to whether the finding of certain narcotics in Yee's house on June 4 corroborates Wong Sun's admission (App. 29-30, *infra*) that he accompanied Wah Toy in transporting narcotics to Yee's four days before. Since Wong Sun's statement suggests that Yee received numerous deliveries of narcotics, there are obviously alternative explanations for narcotics being found at Yee's on June 4, which are as reasonable as the explanation that Wong Sun had helped bring them there "on or about June 1". A comparison of the description by Wong Sun of the narcotics which he and Wah Toy delivered to Yee about June 1, with the government witnesses' description of the narcotics found on June 4, suggests that the latter were different from the former. Wong Sun's state-

[25] See the summary of the corroborative evidence cited in the preceding footnote.

ment described the narcotics as "one piece" (one ounce) "contained in a rubber contraceptive in a small brown paper bag." (App. 29-30, *infra.*) The narcotics found also totaled approximately one ounce (R. 19), but were contained in four rubber contraceptives plus eight bindles of paper (R. 17-19, 64). Thus the narcotics found and introduced into evidence (Gov. Ex. 1) may well have been the subject of one or more different deliveries than the narcotics which Wong Sun's statement described.

In view of the lack of corroborative evidence on at least one, and arguably two, elements of the offense, the evidence as to Wong Sun failed to meet the requirement of *Smith v. United States, supra,* that "All elements of the offense must be established by independent evidence or corroborated admissions . . ." It cannot be concluded on this record, as required by *Smith's* companion case, *Opper v. United States*, 348 U.S. 84, 93, that corroborated admissions plus the other evidence were "sufficient to find guilt beyond a reasonable doubt." The motion for judgment of acquittal on count 2 (R. 118) should therefore have been granted as to Wong Sun.

Conclusion

For the foregoing reasons, petitioners respectfully pray that the judgments of conviction be reversed and the case remanded with directions that the district court enter judgments of acquittal.

EDWARD BENNETT WILLIAMS
(Appointed by this Court)

ROBERT L. WEINBERG

Counsel for Petitioners

February, 1962

APPENDIX

Government's Exhibit 3

Statement of JAMES WAH TOY taken on June 5, 1959, concerning his knowledge of WONG SUN's narcotic trafficking

I have known WONG SUN for about 3 months. I know him as SEA DOG which is what everyone calls him. I first met him in Marysville, California, during a Chinese holiday. I drove him back to San Francisco on that occasion. Sometimes he asks me to drive him home and to different places in San Francisco.

Sometime during April or May of this year, he asked me to drive him out to JOHNNY YEE's house, at 11th and Balboa Streets. He asked me to call JOHNNY and tell him we were coming. When we got there we went into the house and WONG SUN took a paper-package out of his pocket and put it on the table. Then both WONG SUN and JOHNNY YEE opened the package. I don't know how much heroin was in it, but I know it was more than 10 spoons. I asked them if I could have some for myself and they said yes. I took a little bit and went across the room and smoked it in a cigarette.

WONG SUN and JOHNNY YEE talked for about 10 or 15 minutes, but they were talking in low tones so that I could not hear what they were saying. I didn't see any money change hands, because I wasn't paying too much attention. WONG SUN and I then left the house and drove. I drove WONG SUN to his home and he gave me $15.00. He said the money was for driving him out there.

I have driven WONG SUN out to JOHNNY YEE's house about 5 times altogether. Each time WONG SUN gave me $10 or $15 for doing it and also, Johnny gave me a little heroin—enough to put in 3 or 4 cigarettes. The last time I drove WONG SUN out to YEE's house was last Tuesday, May 26, 1959. On Wednesday night June 3, 1959, at about 10:00 p.m., I called JOHNNY YEE and told

him that "I'm coming out pretty soon—I don't have anything". He said okay, so I drove out there. When I got there I went in the house and Johnny gave me a paper of heroin. The bindle had about enough for 5 or 6 cigarettes. I didn't give him any money and he didn't ask for any. He gives it to me just out of friendship. He has given me heroin like this quite a few times. I don't remember how many times. I have known HOM WEI about 2 or 3 years but I have never dealt in narcotics with him. I have known ED FONG about 1 year and I have never dealt in narcotics with him, either. I have heard people that I know in the Hop Sing Tong Club talk about HOM WEI dealing in narcotics but nothing about ED FONG. I do not know JOHN MOW LIM or BILL FONG. The only connection I have now is JOHNNY YEE.

I have carefully read the foregoing statement, which was made of my own free will, without promise of reward or immunity and not under duress. I have been given ample opportunity to make corrections have initialed or signed each page as evidence thereof and hereby state that this statement is true to the best of my knowledge and belief.

.....
JAMES WAH TOY

Witnessed by: Date: .....

.....
William Wong, Narcotic Agent

.....
John C. Campbell, Narcotic Agent

JAMES WAH TOY did not wish to sign this statement at this time. He stated he may change his mind at a later date. However, I read this statement to him and in addition he read it also and stated that the contents thereof were true to the best of his knowledge. Corrections made were by JAMES WAH TOY without his initials.

/s/ WILLIAM WONG
William Wong, Narcotic Agent

Government's Exhibit 4

STATEMENT OF WONG SUN

I met JAMES TOY approximately the middle of March, this year, at Marysville, California, during a Chinese celebration. We returned to San Francisco together and we discussed the possible sale of heroin. I told JAMES that I could get a piece of heroin for $450 from a person known as BILL.

Shortly after returning to San Francisco, JAMES told me he wanted me to get a piece. I asked him who it was for and he told me it was for JOHNNY. He gave me $450 and I obtained a piece of heroin from BILL. I did this on approximately 8 occasions, however, at least one of these times the heroin was not for JOHNNY—for another friend of JAMES TOY. JOHNNY would pay JAMES $600 for each piece.

On several occasions after I had obtained the piece for JAMES I would drive with him to JOHNNY's house, 606 11th Avenue, and we would go upstairs to the bedroom. There, all three of us would smoke some of the heroin and JAMES would give the piece to JOHNNY. I also went with JAMES on approximately 3 other occasions when he did not take any heroin and then we smoked at JOHNNY's and we would also get some for our own use.

About 4 days before I was arrested (arrested on June 4, 1959) JAMES called me at home about 7 o'clock in the evening and told me to come by. I went to the laundry and JAMES told me to get a piece. I called BILL and arranged to meet him. JAMES gave me $450 which I gave to BILL when I met him. BILL called me about one hour later at the laundry and I met him. He gave me one piece, which I gave to JAMES, and JAMES immediately thereafter called JOHNNY. We drove to 606—11th Ave. at approximately midnight and JAMES gave the piece to

JOHNNY. It was contained in a rubber contraceptive in a small brown paper bag.

Again on June 3rd, the night before I was arrested, I met JAMES at the laundry, prior to 11 o'clock in the evening, and JAMES telephoned JOHNNY at EV—6-9336. Then we went out to JOHNNY's and smoked heroin and also had one paper for our own use later. We were there approximately ½ hour and then left.

The laundry mentioned is OYE's LAUNDRY, 1733 Leavenworth Street, which is run by JAMES TOY. I do not know JOHNNY's last name and know him only through JAMES TOY. As well as the few times at JOHNNY's home, I have seen JOHNNY on a number of occasions at the laundry.

I have carefully read the foregoing statement, consisting of 2 pages which was made of my own free will, without promise of reward or immunity and not under duress. I have been given ample opportunity to make corrections, have initialed or signed each page as evidence thereof and hereby state that this statement is true to the best of my knowledge and belief.

.....

WONG SUN

Subscribed and sworn to before

me this ..... day of ..... 1959.

.....

Narcotic Agent

WONG SUN, being unable to read English, did not sign this statement. However, I read this statement to him and he stated that the contents thereof were true to the best of his knowledge.

/s/ WILLIAM WONG

William Wong, Narcotic Agent

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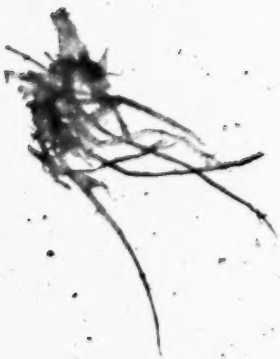

In the Supreme Court of the United States

OCTOBER TERM, 1961

No. 479

WONG SUN AND JAMES WAH TOY, PETITIONERS

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the court of appeals (R. 135–145) is reported at 288 F. 2d 366.

JURISDICTION

The judgment of the court of appeals was entered on March 10, 1961 (R. 146). A petition for rehearing was denied on April 12, 1961 (R. 146). The petition for a writ of certiorari was filed on May 5, 1961, and was granted on October 9, 1961 (R. 147). The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the arrests of petitioners were based on probable cause and therefore lawful.

2. Whether petitioners' confessions, and the narcotics obtained as the result of one petitioner's statement, were admissible even if petitioners' arrests were invalid.

3. Whether petitioners' confessions were sufficiently corroborated.

STATUTE INVOLVED

Section 7607 of Title 26 U.S.C. provides:

> The Commissioner, Deputy Commissioner, Assistant to the Commissioner, and agents, of the Bureau of Narcotics of the Department of the Treasury, and officers of the customs (as defined in section 401(l) of the Tariff Act of 1930, as amended; 19 U.S.C., Sec. 1401(l)), may—
>
> (1) carry firearms, execute and serve search warrants and arrest warrants, and serve subpoenas and summonses issued under the authority of the United States, and
>
> (2) make arrests without warrant for violations of any law of the United States relating to narcotic drugs (as defined in section 4731) or marihuana (as defined in section 4761) where the violation is committed in the presence of the person making the arrest or where such person has reasonable grounds to believe that the person to be arrested has committeed or is committing such violation.

STATEMENT

Petitioners were convicted in the United States District Court for the Northern District of California (a jury having been waived) of concealment and transportation of illegally imported heroin, in violation of 21 U.S.C. 174 (R. 4–5, 124, 126). Petitioner James Wah Toy was sentenced to imprisonment for five years (R. 126), and petitioner Wong Sun, as a second offender, to imprisonment for 10 years (R. 121, 124).

The issues in this Court relate primarily to the trial court's refusal to exclude evidence as to statements made by petitioner Toy at the time of, and after, his arrest, narcotics found by the federal agents at the home of a third party (Johnny Yee) after they had arrested Toy, and formal confessions made by petitioners Toy and Wong Sun some days later, after they had been arraigned. Petitioners objected at the trial to the admission of this evidence (R. 31 *ff.*, 48–50, 57–62, 64, 69, 72–73, 74, 77, 91, 100 *ff.*).

I. THE EVIDENCE

A. THE ARREST OF PETITIONER TOY

Between 5:30 and 6:00 o'clock on the morning of June 4, 1959, one Hom Way told federal narcotics agent William Wong that he had purchased an ounce of heroin the night before from a person known as "Blackie Toy" who operated a laundry on Leavenworth Street in San Francisco (R. 54–55). Hom Way had been arrested at about 2:00 o'clock that morning (June 4), in possession of narcotics (R.

55–56). The agent had known Hom Way about six weeks. When questioned at the trial as to whether Hom Way was a reliable informer, the agent replied, "I believe so, yes sir" (R. 54), and repeated, on cross-examination, "I believe he would be reliable" (R. 55). The agent did not have knowledge as to whether Hom Way had been arrested or convicted for any previous narcotics violations (R. 56). This was the first information the agent had received from Hom Way (R. 56).

At about 6:30 a.m. on June 4, federal agent Alton Wong went to the door of petitioner's Toy's laundry on Leavenworth Street (R. 33, 51). In June at this time of morning it was no longer dark (R. 34; and see R. 58). The federal agent went to the door alone, rang the bell, and knocked (R. 34, 36, 51). When petitioner Toy opened the door, the agent said he wanted some laundry. Toy replied that he did not open until 8, and to return then (R. 51). The agent then exhibited his official badge and informed Toy, "I am a federal narcotics agent" (R. 51–52). Toy slammed the door and the agent, seeing through the glass of the door that Toy was running toward the rear of the premises, forced the door open, and pursued Toy (R. 52).[1] The officer, running after Toy, repeated, "I am a narcotics treasury agent," but Toy ran on into the living quarters to the rear (R. 52–53). Toy ran over the top of the bed where his wife and child were sleeping, in order to reach a nightstand

[1] Toy, testifying on *voir dire*, denied that the agent had identified himself before Toy began to run, and alleged, "I wasn't running, I was just taking big steps" (R. 39).

drawer, "and reached in for something in there" (R. 52). The agent, following Toy over the bed, seized him, drew his gun and told Toy he was under arrest. The nightstand drawer was empty. Toy was handcuffed and the agent then searched the premises (R. 52, 66). Nothing was found at the time (R. 52, 65–66).

B. THE SURRENDER OF THE NARCOTICS BY JOHNNY YEE

One of the agents informed Toy of Hom Way's statement that Toy had sold him narcotics. Toy denied that he had sold narcotics but added that he knew someone who had—one "Johnny"—at whose house he had been the night before (R. 63). Toy gave full details as to the appearance of the house, the location of "Johnny's" bedroom there, the amount of heroin in his possession, and the usual practice of "Johnny's" mother to come out of the house at about 8 a.m. with the children going to school. The agents immediately left for the house, arriving there at about 8 a.m. on June 4, at which time a youngster and a man and a woman came out. One of the agents showed his badge to the woman and asked whether Johnny was at home. She replied, "Yes, he is upstairs." In the bedroom, Yee surrendered about an ounce of heroin, without a search (R. 19, 63–64, 66). He was arrested (R. 20).

C. THE ARREST OF PETITIONER WONG SUN

At the office of the Bureau of Narcotics—"within an hour or so" on June 4 (R. 90, 94)—Yee informed the agents that the heroin had been brought to his house by petitioner Toy and a person known to him

only as "Sea Dog" (R. 90, 94). Petitioner Toy informed the agents, at about 10:30 a.m., that the person known to Yee as "Sea Dog" was petitioner Wong Sun. Toy went with the agents to identify Wong Sun's residence (R. 90, 95).

At Wong Sun's residence, at a little after 11 a.m. on June 4, agent Alton Wong rang the door bell. When a lady opened the door, he entered and asked for Mr. Wong. At this time Betty Wong appeared. Agent Wong identified himself as from the Federal Bureau of Narcotics. Agent Casey, who followed him in, addressed Mrs. Wong as "Betty" and asked her where Wong Sun was. She informed him that he was in the back room sleeping. Agent Casey then arrested Wong Sun, and the premises were searched (R. 96–99).[2]

D. THE SUBSEQUENT CONFESSIONS BY PETITIONERS

Although the record does not contain the information, the fact is that petitioner Toy was arraigned before the Commissioner on June 4 and petitioner Wong Sun on June 5. Each was released on his own recognizance. On June 9, each of the petitioners was interviewed separately by an agent at the Bureau offices.[3] Each was told of his right not to answer

[2] Wong Sun and his sister-in-law testified on *voir dire* that the arrest was made after an entry by asking for another person and while Wong Sun and his wife were in bed asleep (R. 81–89). Wong Sun stipulated that he had previously been convicted of a narcotics felony (R. 89).

[3] The agent testified, as to Toy, that he "spoke with" Toy, also, on the 5th of June, "I believe" (R. 67). The statement of Toy bears, in the heading, the notation that it was "taken on June 5, 1959."

questions or make a statement, of his right to counsel, and of the fact that any statement made could be used against him. Each was told that the agent could make no promises of immunity or leniency. Thereafter each discussed details of narcotics transactions, first by answering questions, then by repeating details to the agent who took down the answers in rough form and subsequently prepared a typewritten statement. Each statement was shown to the respective petitioner, read to him in English, and interpreted in Chinese. Each petitioner acknowledged his statement to be correct but refused to sign it, because of the absence of assurance that the other had also signed (R. 66–72). The statements were admitted into evidence over objection (R. 106).

1. *Wong Sun's confession* (*Exhibit 4*).

Wong Sun's confession included the following statements: He met Toy at Marysville, California, about the middle of March 1959, during a Chinese celebration. They returned to San Francisco together and discussed the possible sale of heroin. Wong Sun informed Toy that he could get a "piece" from one "Bill" for $450.[3a]

Shortly thereafter, Toy told Wong Sun he wanted a "piece" for "Johnny." Wong Sun knew Johnny only through Toy. Wong Sun obtained the heroin, and did so again on about 7 or 8 additional occasions, on one of which the heroin was for someone other than Johnny.

On several occasions after obtaining the first "piece," Wong Sun drove with Toy to Johnny's house, 606–11th Avenue, and Toy would deliver the

[3a] A "piece" is 28 grams (one ounce) (R. 19, 63–64).

heroin to Johnny and the three would smoke some of it. Johnny paid Toy $600 for each "piece." On three other occasions Wong Sun and Toy went to Johnny's without bringing heroin, and smoked heroin there and obtained some for themselves.

About four days before the arrest [the arrest was on June 4],[4] Toy gave Wong Sun $450 and, after the latter obtained the heroin, Toy phoned Johnny, and Toy and Wong Sun drove to Johnny's house at about midnight. Toy gave the heroin to Johnny in a rubber contraceptive enclosed in a small brown bag.

On the night before the arrest, before 11 p.m., Toy phoned Johnny, and the two went to Johnny's to smoke heroin for half an hour. They also obtained one "paper" of heroin for their own use later.

2. *Toy's confession* (*Exhibit 3*).

Toy's confession included the following statements: He first met Wong Sun, known to him as "Sea Dog," about three months before June 5, 1959, at Marysville, California, during a Chinese holiday. Toy drove him back to San Francisco.

Sometime during April or May of 1959, Wong Sun asked Toy to drive him to the home of Johnny Yee, at 11th and Balboa Streets, first asking Toy to phone Johnny that they were coming. Wong Sun there delivered to Johnny a paper package of heroin and, upon Toy's request, gave him some which he

[4] This would place the date on May 31 and the post-midnight events on June 1.

smoked. Wong Sun paid Toy $15 for driving him to Johnny's.

Toy drove Wong Sun to Johnny's "about 5 times altogether," each time receiving $10 or $15 and Toy was also given enough heroin for 3 or 4 cigarettes. The last occasion for driving Wong Sun was "last Tuesday, May 26."[5] Thereafter, on Wednesday night, June 3, at about 10 p.m., Toy phoned Johnny that he didn't "have anything" and was coming out "pretty soon." When he arrived, Johnny gave him—"just out of friendship"—a paper of heroin sufficient for 5 or 6 cigarettes, without any money given or asked. "He has given me heroin like this quite a few times. I don't remember how many times."

Toy had "known Hom Wei [the original informer, *supra*, pp. 3–4] about 2 or 3 years but I have never dealt in narcotics with him. * * * The only connection I now have is Johnny Yee."

E. THE TESTIMONY OF JOHNNY YEE

Johnny Yee, called as a government witness, proved recalcitrant. He admitted, however, that he knew both Wong Sun and Toy, and identified both in the courtroom (R. 20). He stated that he had known Toy since 1951 or 1952 and had known Wong Sun that year, 1959 (R. 20). He confirmed Wong Sun's nickname of "Sea Dog" (R. 20). He stated that, a month before his arrest, Toy, with wife and

[5] "Last Tuesday," whether viewed from June 5 (a Friday) or June 9 (a Tuesday), would have been June 2, not May 26, which was two Tuesdays before.

children, had visited his home (R. 20–22). He admitted that he had made a sworn statement to the officers that on Monday, June 1, prior to midnight, Wong Sun and Toy had come to his house, and that on Wednesday evening, June 3, Toy had phoned before 11 p.m. that he would be by, and that he and Wong Sun had come up between 11:00 p.m. and midnight (R. 30). He stated, however, that he had lied in making the latter statements (R. 30). The government thereupon dismissed the witness.

II. THE OPINION OF THE COURT OF APPEALS

The court of appeals, one judge dissenting, affirmed the convictions. The court concluded that the arrest of each petitioner had been based on information not known to be reliable, and hence was without probable cause, but held that the illegality of the arrests did not render inadmissible the voluntary confessions, or preclude the agents from using information obtained from the pre-confession statements as leads for tracking down the criminals (R. 135–145).

SUMMARY OF ARGUMENT

The court of appeals considered petitioners' arrests to have been based on insufficient probable cause but held, in effect, that there was nothing in the arrest of petitioner Toy which required him to accuse Johnny Yee and to send the narcotics agents to Yee's house, and hence that the surrender of the narcotics by Yee could not be deemed the fruit of the arrest of Toy. Similarly, the unanticipated statements by Yee, which

led on from him to petitioner Wong Sun and unexpectedly circled back to involve Toy as well, were not the fruit of the arrest of Toy. And the later confessions of Toy and Wong Sun, yet another stage removed, were likewise considered by the court of appeals not to be fruits of the arrests of either Toy or Wong Sun.

The government agrees with the court of appeals that the evidence introduced at the trial was not the product of the arrests. However, it is the government's initial position that that issue need not be reached because the judgments below may be sustained upon the ground that the arrests were lawful emergency arrests based upon probable cause.

I

Petitioners were lawfully arrested on probable cause.

A. In ruling that there was a lack of probable cause, the court of appeals unduly emphasized what is only one element in the determination of reliability—the receipt of prior information from an informant. Information may be given under such circumstances that it has the badge of reliability even if the informant has not previously had occasion to furnish information to the officers. The question is always whether, under the particular circumstances presented by the record, the officers acted reasonably. There is no mechanical rule forbidding reliance on information from an informant who has not previously been tested.

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B. At least two elements were operative in the arrest of Toy, and the government need not and does not attempt to rely on either element alone to show that the officers acted reasonably.

1. The first factor was the statement of Hom Way to the agents that he had obtained an ounce of heroin the night before from Toy. The agent had known Hom Way for six weeks and therefore had a basis for judging whether, under arrest, he would be likely to tell the truth or attempt to throw the agents off the scent. An investigator must have leeway to make an informed judgment as to the character of the persons with whom he must deal. Hom Way's designation of petitioner was not vitiated by the fact that Hom Way was himself under arrest; indeed, his statements, which were quite detailed, could be viewed with more confidence since he must have known that he could and would be confronted with any inconsistencies that might develop.

2. The second element is what occurred at Toy's place. The officers did not go to the door in a group, as would have been the case had an arrest been intended on the basis of Hom Way's statement alone; one officer went to investigate further by interviewing Toy, while the others remained nearby. The hour was early, 6:30 a.m., but it was daylight, not darkness. Moreover, the officers were on the trail of heroin, which is easily concealed or destroyed; word of Hom Way's arrest or even of his disappearance from his ordinary haunts could travel quickly.

The officer knocked, and when Toy opened the door, the agent began by asking for laundry. When Toy

told the agent to return for his laundry later, the latter merely showed his badge and stated, "I am a federal narcotics agent." He said nothing about an arrest. There then occurred the action by Toy that forced upon the officer a split-second decision and demonstrated to him that immediate arrest was necessary. Toy slammed the door shut and fled toward the rear of the laundry. If he had narcotics on the premises he could conceal or destroy them in an instant. The door was not slammed when the man at the door inquired for laundry; it was slammed when the officer's badge was exhibited. The officer then had cause to believe Toy guilty, for an unexplained flight from an officer is strong indication of guilt.

3. Petitioners contend that the absence of affirmative evidence that the officer stated his purpose to arrest Toy brings the case within the prohibition of *Miller* v. *United States*, 357 U.S. 301. The language of *Miller* itself answers this contention. This Court there noted decisions (p. 309) "holding that justification for noncompliance [with the requirement of statement of purpose] exists in exigent circumstances, as, for example, when the officers may in good faith believe * * * that the person to be arrested is fleeing or attempting to destroy evidence. *People* v. *Maddox*, 46 Cal. 2d 301, 294 P. 2d 6."

C. In the case of the arrest of Wong Sun, probable cause for arrest was provided by the combined, consistent statements of Yee and petitioner Toy. Yee's accusation of "Sea Dog" (Wong Sun) as the supplier (with Toy) of his narcotics was significantly corroborated before the officers went to arrest Wong

Sun. Yee's statement that he had been furnished heroin was substantiated by his actual possession of the drug. His surrender of the narcotics to the officers, without a search, was not attended by any unlawful conduct by the officers. His statement that Toy had been one of the two who furnished the heroin was substantiated by Toy's detailed knowledge of Yee's possession of the narcotics, as revealed in Toy's earlier statement to the officers. Yee's tie-in of "Sea Dog" with Toy dove-tailed immediately thereafter with Toy's knowledge of the real name of "Sea Dog" Wong Sun and Toy's knowledge of where Wong Sun lived.

II

On the assumption that the arrests were illegal, petitioners contend that all the evidence obtained after those arrests must be deemed the "fruits of the poisonous tree" and therefore inadmissible. While it is the rule that, if the evidence sought to be introduced is the true product of illegal government action it is excludable, it is not the rule that the mere fact that there has been illegal government action at some prior point is sufficient. If the evidence is attributable to an intervening act of free will on the part of the defendant and not to the illegal government action, the evidence is admissible. Whether evidence can be said to be the result of the illegal action or of an independent act of free will requires a judgment based on the precise facts of a given case. In particular, the question of whether a statement made at the time of illegal entry should be deemed admissible

cannot be settled by any fixed rule but must essentially represent a judgment, based on all the circumstances, as to whether the illegal government action or the voluntary act of the defendant is the primary motivating force behind the evidence. In the present case, petitioners' statements to the officers were not the products of illegal arrests or entries, but of their own voluntary, deliberate decision to speak.*

Nueslein v. *District of Columbia*, 115 F. 2d 690 (C.A.D.C.), held that, even though nothing was found after an illegal entry, certain statements made during the illegal entry were the result of the illegality and therefore inadmissible. Officers investigating only a misdemeanor, an accident in which a taxicab had struck a parked car, went to the home of the taxicab owner and entered the home without a warrant and without permission of the owner. The owner admitted that he had been driving the taxi and, since he appeared to the officers to be drunk, the officers placed him under arrest. The decision of the District of Columbia Circuit, in relating the admissions to the illegal entry when the illegal entry in no sense compelled the owner to talk, admittedly goes far, but it does not go as far as would be necessary to go in the instant case of investigation of a narcotics felony. In *Nueslein* the admissions made by the taxicab owner were admissions of guilt as to the very act which prompted the officers to make the illegal entry, and those admis-

* The full and formal confessions by petitioners, which were wholly voluntary, were clearly admissible under the settled rule that a subsequent voluntary confession is not rendered excludable by a prior illegal arrest.

sions were made by an intoxicated man. Here, petitioner Toy, although knowing that the officers had found nothing of what they sought, deliberately and voluntarily sent them to Johnny Yee in order to divert suspicion from himself. It was Hom Way's accusation of Toy which caused Toy to send the officers to Yee's house, and Hom Way's accusation in no way stemmed from the illegal entry. Toy merely saw an opportunity to sidetrack the officers from Hom Way's accusation, and consciously made use of that opportunity. In short, he would now have the Court bar evidence that he himself deliberately uncovered.

III

Petitioners' confessions were corroborated by substantial additional evidence, and the confessions disclosed such possession of narcotics as served to raise the statutory presumption of guilty knowledge.

A. Corroboration of a confession requires only evidence that will tend to establish its trustworthiness, and does not demand evidence sufficient to establish the corpus delicti independently. The special problem with respect to reliance on a confession arises out of concern whether a particular confession may be the product of "the aberration or weakness of the accused under the strain of suspicion" (*Opper* v. *United States*, 348 U.S. 84, 90). But if facts are shown, by evidence other than the confession, demonstrating that the confession is not a fantasy warped by the aberration or weakness of the accused, then the finder of fact may properly attribute the confession to the familiar motivation of an accused per-

son who realizes that he has been caught and may as well tell the truth.

B. In the case of Wong Sun's confession, the trial judge could properly conclude that his chronicle, from the time of his first acquaintance with Toy, in March 1959, through his series of visits with Toy at Yee's house, terminating in the visits on or about June 1 and 3, was sufficiently corroborated to be accepted. The critical portion of the confession, *i.e.*, Wong Sun's statement that he transported an ounce of heroin from his source of supply to Toy on the night of May 31, 1959, and that he and Toy then transported the heroin to Yee at Yee's house at about midnight, is firmly supported by the actual possession of 27 grams of the heroin by Yee at Yee's house on the morning of June 4. The absence of a part of the ounce, and the division of the heroin into several containers after being brought to Yee's house in one container, substantiate the further portion of Wong Sun's confession that he and Toy had gone to Yee's house again on the night of June 3, smoked heroin, and taken one "paper" for their later use. In addition, there was corroboration of parts of the confession in Agent Nickoloff's testimony that Toy had admitted to him on June 4 that he had been at Yee's house the night before, as well as in the separate testimony of Yee showing that he knew Wong Sun.

C. Toy's confession, unlike that of Wong Sun, shows an effort on his part to withhold some of the facts. Like the accused in *Opper* v. *United States, supra,* 348 U.S. 84, he obviously sought to admit only what he thought could be proved against him by other

evidence. But what Toy stated in his confession was sufficiently corroborated to warrant consideration of his statement. When he confessed to delivery of heroin at Yee's house, he was not spinning a fantasy—the 27 grams of heroin at Yee's house on the morning of June 4 corroborated this admission. Additionally, Toy admitted a series of visits to Yee's house. This was corroborated in Toy's very detailed familiarity with the house, as disclosed in the testimony of Agent Nickoloff. The statement in Toy's confession specifically placing him at Yee's house on the night of June 3 was further substantiated in Agent Nickoloff's testimony that Toy admitted to him on June 4 that he had been at Yee's house the night before. There were also other elements of corroboration.

ARGUMENT

Petitioners argue that the trial court erred in admitting several items of evidence—petitioner Toy's statements to the federal agent (at the time of and after his arrest) which led the agents to Johnny Yee and to petitioner Wong Sun, the narcotics found at Yee's house, and the formal confessions made by petitioners some days later, subsequent to their arraignment—because all of this evidence resulted from the petitioners' arrests which are claimed to have been unlawful. Although holding that the arrests of both petitioners were invalid as not based on probable cause, the court of appeals sustained the convictions on the ground that the invalidity of the arrests did not void the confessions by petitioners nor the statement by petitioner Toy which led the agents to recover narcotics from Yee. In effect, the court

held that there was nothing in the fact of petitioner Toy's arrest which required him to send the agents to Yee and hence that the finding of narcotics at Yee's house could not be deemed the fruits of the illegal arrest. Similarly, this new information, which led to proof against petitioner Wong Sun and circled back to Toy as well, was held not to be the fruit of the arrest of Toy.

The government agrees with the court of appeals that the evidence introduced at the trial was detached from and not the product of the arrests. However, as pointed out in the government's brief in opposition, it is our initial position that that issue need not be reached because we believe that the judgments below may be sustained upon the ground that the arrests were lawful emergency arrests based upon probable cause. We discuss first our reasons for believing that the arrests were lawful, before turning to the grounds relied upon by the court of appeals.

I

PETITIONERS WERE LAWFULLY ARRESTED UPON PROBABLE CAUSE

It is the position of the government that, in the circumstances of this case, the petitioners were lawfully arrested. In the case of Toy, reasonable grounds for an immediate arrest without warrant arose from the combined impact of two elements: first, the specific designation of Toy as a source of supply of narcotics by a man deemed reliable by a federal narcotics agent, and, second, the flight by Toy when confronted

with a narcotics agent's badge and identification. The narcotics agent did not arrest Toy upon the word of the informer (Hom Way) alone. He first went to Toy's door for further investigation and sought to engage Toy in conversation under guise of seeking laundry and, then, by making known his identity as a federal narcotics agent. At this point Toy took flight, and the agent pursued and arrested him.

In the arrest of Wong Sun, the identification was the product of the combined information from both Yee and Toy; the former was the authentic possessor of the heroin and the latter the supplier of exact and correct information as to the location of the heroin and of Wong Sun.

A. UNDER COMMON LAW AND 26 U.S.C. 7607, ARRESTS MAY BE MADE WITHOUT WARRANT UPON PROBABLE CAUSE OR UPON "REASONABLE GROUNDS TO BELIEVE THAT THE PERSON TO BE ARRESTED HAS COMMITTED" A NARCOTICS FELONY

Probable cause for arrest under the Fourth Amendment and the specific statutory "reasonable grounds" upon which federal narcotic agents may arrest without a warrant "are substantial equivalents of the same meaning". *Draper* v. *United States*, 358 U.S. 307, 310. The broad requirements of probable cause, to be applied to the specific facts of cases as they arise, have been stated by this Court as follows:

> In dealing with probable cause, * * * as the very name implies, we deal with probabilities. These are not technical; they are the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act. The standard of proof is ac-

cordingly correlative to what must be proved.

"The substance of all the definitions" of probable cause "is a reasonable ground for belief of guilt." *McCarthy* v. *De Armit,* 90 Pa. St. 63, 69, quoted with approval in the *Carroll* opinion. 267 U.S. at 161. And this "means less than evidence which would justify condemnation" or conviction, as Marshall, C.J., said for the Court more than a century ago in *Locke* v. *United States,* 7 Cranch 339, 348. Since Marshall's time, at any rate, it has come to mean more than bare suspicion: Probable cause exists where "the facts and circumstance within their [the officers'] knowledge and of which they had reasonably trustworthy information [are] sufficient in themselves to warrant a man of reasonable caution in the belief that" an offense has been or is being committed. *Carroll* v. *United States,* 267 U.S. 132, 162.

These long-prevailing standards seek to safeguard citizens from rash and unreasonable interferences with privacy and from unfounded charges of crime. They also seek to give fair leeway for enforcing the law in the community's protection. Because many situations which confront officers in the course of executing their duties are more or less ambiguous, room must be allowed for some mistakes on their part. But the mistakes must be those of reasonable men, acting on facts leading sensibly to their conclusions of probability. The rule of probable cause is a practical, nontechnical conception affording the best compromise that has been found for accommodating these often opposing interests. * * * [*Brinegar* v. *United States,* 338 U.S. 160, 175–176].

To this may be added the further illumination of observations in the courts of appeals. In *Christensen* v. *United States*, 259 F. 2d 192, 193, the Court of Appeals for the District of Columbia Circuit said:

> Taking into account the detailed description of appellant secured through the advance "tip" along with the detective's observations of appellant's appearance and conduct * * * we hold that there was probable cause for the officer to make the arrest. We cannot view the advance "tip" information and the observations of the police detective in two separate logic-tight compartments. Neither one standing alone would constitute probable cause, but together they composed a picture meaningful to a trained, experienced observer.

And in *Bell* v. *United States*, 254 F. 2d 82, 85 (C.A. D.C.), Judge Prettyman noted that suspicion *on reasonable grounds* is not the "mere suspicion" denounced in *Mallory* v. *United States*, 354 U.S. 449, 454, and stated (254 F. 2d at 85–86):

> [Officers] do not schedule their steps in the calm of an office. Things just happen. They are required as a matter of duty to act as reasonably prudent men would act under the circumstances as those circumstances happen. * * *
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> * * * * *
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> [The] action [of an officer experienced in the narcotics traffic] is not measured by what might be probable cause to an untrained civilian passerby. When a peace officer makes the arrest, the standard means a reasonable, cautious and prudent peace officer. The question

is what constituted probable cause in the eyes of a reasonable, cautious and prudent peace officer under the circumstances of the moment.

B. THE COMBINATION OF THE NAMING OF PETITIONER TOY BY INFORMER HOM WAY AS HIS SOURCE OF SUPPLY OF NARCOTICS, AND THE ATTEMPTED FLIGHT OF TOY WHEN THE FEDERAL AGENT IDENTIFIED HIMSELF AS A FEDERAL NARCOTICS AGENT, GAVE THE AGENT PROBABLE CAUSE JUSTIFYING THE IMMEDIATE ARREST OF TOY

At least two elements were operative in the arrest of petitioner Toy, and we need not and do not attempt to separate them or to rely upon either element alone. The combination of both, we believe, adds up to probable cause for the arrest of Toy.

1. *Hom Way's statement that he had obtained narcotics from Toy was entitled to great weight.*

The first element, in point of time, in the composite of elements that led to Toy's arrest was the statement of informer Hom Way that he had obtained an ounce of heroin, the night before, from Toy. In appraising the weight of that one statement, one cannot determine its reliability solely upon the basis of whether Hom Way had or had not previously furnished information to the agents. We think that, in stressing this factor, the court of appeals unduly emphasized what is only one element in the determination of an informer's reliability—the receipt of prior information from him. The element of past receipt of information would clearly be a favorable factor, but it is not indispensable. When this Court, in *Draper* v. *United States*, 358 U.S. 307, referred to the fact that there the government agent had received information from the special employee in the past, it was not ruling that

this was indispensable, or that an agent cannot have other reasons for believing an informant. An adequate judgment of reliability depends on a number of circumstances. If relatives of an accused give information as in *United States* v. *Naples,* 192 F. Supp. 23 (D. D.C.), pending on appeal, C.A. D.C., No. 16436,[7] officers have a right to take the information very seriously, even if they have never received information from such persons before.[8] Very little corroborating information would be needed to justify an officer in reaching the conclusion that the information given was reliable. On the other hand, more corroboration may reasonably be deemed necessary if information came from an anonymous tip or from a source, theretofore unknown, as to which the officers had no

[7] *Naples*, a homicide case, involved information given by the defendant's brother.

[8] *People* v. *Witt*, 159 Cal. App. 2d 492, cited by petitioners (Pet. Br. 9), while stating, without citing authority, that one Cibrian could not be considered to be a "reliable informant" because he had not theretofore given the police information, reversed this conclusion in the actual holding of the case. Cibrian's statement that a certain car contained "hot stuff" and guns was deemed sufficient to justify the action of the officers in approaching the car with drawn guns, ordering defendant and another man out of the car, and searching the car for weapons. This search disclosed the stolen articles and guns upon which the defendant was later convicted of burglary. The court assumed that the arrest was made only after the findings in the car, but the court obviously thought the information given by Cibrian justified further investigation.

opportunity for judgment." The question is always whether under the particular circumstances the agents acted reasonably.

In this case, agent Wong was dealing with a person (Hom Way) whose character he had had an opportunity to appraise. The court of appeals observed that there was "no showing in this case that the agent knew Hom Way to be reliable" (R. 139–140). However, the federal officer testified that he had known Hom Way for six weeks and judged him to be reliable. It was not incumbent on the prosecution to develop in the first instance all the detailed mental pro-

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[9] Anonymous or virtually unknown informers were involved in many of the cases where reliance on an informant was held not to constitute probable cause. *Worthington* v. *United States*, 166 F. 2d 557 (C.A. 6), involved an unknown voice on the telephone, and *Contee* v. *United States*, 215 F. 2d 324 (C.A.D.C.), cited by petitioners (Pet. Br. 8), a tip from a man whose name was unknown. Similarly, in *Wrightson* v. *United States*, 222 F. 2d 556 (C.A.D.C.), cited by petitioners (Pet. Br. 8), the record disclosed no identified informer but only an "anonymous" tip (*Id.*, 557); when further information was developed on retrial, the court found that there was probable cause for the arrest. 236 F. 2d 672, 673 (C.A.D.C.). See also *People* v. *Goodoo*, 147 Cal. App. 2d 7; *People* v. *Thymiakas*, 140 Cal. App. 2d 940, 941. In *People* v. *Walker*, 165 Cal App. 2d 462, 465, cited by petitioners (Pet. Br. 8), the court referred to the asserted absence of any previous use of the particular informants as such, "or other evidence" to establish their reliability, but then found the "other evidence" of reliability in the corroboration of the informants' correct statement of the name assumed by defendant and of defendant's then whereabouts at a hotel (*Id.*, 465); the combination of this with observations by the officers was held to sustain the arrest.

cesses that went into that judgment. The officer was experienced and could draw upon his investigative training and experience in making his appraisal. If petitioner wished to attack the basis of the officer's judgment, it was open to him to seek further details on cross-examination or to offer countervailing evidence. Petitioners cannot rely upon mere conjecture by counsel (R. 60) that the federal agent could have known Hom Way only by limited investigation or that such investigation could not have disclosed probable cause for reliance on him.

Furthermore, the evidence did show circumstances pointing to the reliability of the information beyond the officer's personal appraisal of Hom Way. The latter, while under arrest, gave specific information that he had obtained an ounce (a substantial amount) of heroin the night before from a particular person who operated a laundry on a named street in San Francisco. The very fact that Hom Way was this specific in his statement, while under arrest, tended to give credence to his information, for the information was in sufficient detail to be checked and Hom Way could and would be confronted with any discrepancies if the information proved to be incorrect—as he doubtless knew.

The specificity of information given by an informant is a factor which the courts have considered in determining whether an officer can reasonably rely upon it. See *Jackson* v. *United States*, C.A. D.C., No. 16631, decided February 8, 1962. In *Draper* v. *United States*, 358 U.S. 307, one of the elements which entered into the evaluation of probable cause was the

fact that the informant had given specific information of the defendant's appearance and manner which observations by the officers could corroborate.[10] The courts have held that information given by persons under arrest or by their friends is entitled to credence so that when it is corroborated only slightly the total circumstances can and do amount to probable cause for an arrest. See *Thomas* v. *United States*, 281 F. 2d 132 (C.A. 8), certiorari denied, 364 U.S. 904, where the court found probable cause for an arrest in statements by relatives of thieves that stolen property had been sold to the defendant. Indeed, the court below in *Rodgers* v. *United States*, 267 F. 2d 79 (C.A. 9),[11]

[10] On the other hand, in some of the cases, information given by informers was held insufficient because it was stale or because it was not specific. *E.g.*, In *Cervantes* v. *United States*, 263 F. 2d 800, 804–805 (C.A. 9), cited by petitioners (Pet. Br. 9), the court did not reach the question whether a sufficient showing was made as to the "trustworthiness" of the informant—since the informant's information related to incidents 6 to 10 weeks before the arrest. In *People* v. *Dawson*, 150 Cal. App. 2d 119, cited by petitioners (Pet. Br. 9), the objection to the information was not to the absence of past experience with the informer (he had three times provided valid information), but with the lack of specificity—such information would cause arrest of "any Negro anywhere in San Francisco driving a [1953 Oldsmobile '98' convertible with a black top and light body]" (*Id.*, 123, 129). The court *sustained* the arrest, however, upon the additional element of flight.

[11] This decision was cited in the opinion below for the requirement that the person furnishing information be "reliable", but nothing in *Rodgers* bases "reliability" exclusively upon past furnishing of information. To the contrary, in *Rodgers* the addict who accused the defendant had theretofore had no contact with the agents (*id.*, 83).

found that information given by a person under arrest constituted probable cause when viewed in relation to the fact that the defendant was found at the place where the informer had said she would be and where her husband had denied that she was. See also *People* v. *Howard*, 173 Cal. App. 2d 787, where information given by a group passing forged checks was held to be sufficiently corroborated by the defendant's attempted flight in slamming a door in an officer's face.

Whether or not it would itself constitute probable cause for an arrest, the information given by Hom Way to the agent was entitled to be given considerable weight. It had sufficient earmarks of credibility to justify, indeed to require, investigation. The agents would have been derelict in their duty had they failed to pursue the matter further. And when, in the course of their inquiry, other events (discussed below, pp. 28–33) occurred which gave support to Hom Way's information, the agents had probable cause to arrest petitioner Toy.

2. *The actions of Toy, when he learned that the man at his door was a federal narcotics agent, were sufficient corroboration of the prior information to constitute probable cause for Toy's arrest.*

The officers did not proceed to arrest Toy simply upon the basis of Hom Way's designation of Toy as the supplier of narcotics. Rather, the agents proceeded immediately to investigate by interviewing Toy. They did not go to the door in a group, as would have been the case had an arrest been intended. One of the officers remained as far away as half a block

(R. 35). The other officers were available if an arrest should become necessary or if a search were voluntarily permitted by Toy, but only one officer went to the door.

The hour was early, 6:30 a.m., but it was daylight, not darkness. The fact that it was no longer dark at this time of year is of more significance than the exact hour. For example, while a search warrant must be served in "the daytime" if the affidavits are not positive as to the location of the property (Rule 41(c), F.R. Crim. P.), the test is not the time of rising or setting of the sun but whether there is light; dawn or twilight suffices. *Moore* v. *United States*, 57 F. 2d 840, 843 (C.A. 5); *United States* v. *Liebrick*, 55 F. 2d 341, 343 (M.D. Pa.); *Albright* v. *Baltimore & O.R. Co.*, 22 F. 2d 832 (E.D. N.Y.). Nor is 6:30 a.m. so unreasonably early as to be compared to pulling a man out in the small hours after midnight. This was a laundry which was due to open at 8, or possibly 8:30, o'clock (see R. 51, cf. R. 38), and a community in which many businesses open at 8 o'clock. In judging the reasonableness of the officer's action it is also necessary to bear in mind that, in dealing with as easily concealable and as valuable a contraband as heroin, delay in the investigation could have serious consequences. Word of Hom Way's arrest or even of his disappearance from his ordinary haunts could travel quickly and lead to the hiding or destruction of the narcotics.

The officer knocked, and when Toy opened the door he began by asking for laundry. Had the officer contemplated immediate arrest, he would have indulged

in no such conversation; with the door open, he could have seized Toy. Instead, when Toy terminated the opportunity for further conversation by telling the agent to return for his laundry later, the agent merely disclosed his official capacity, obviously to continue the interview. He showed his badge and stated, "I am a federal narcotics agent." He said nothing about an arrest. This is undisputed in the officer's testimony and that of Toy himself (R. 51–53; 38, 39, 45–47). Contrary statements in the arguments of counsel in the district court are not supported by the record.

There then occurred the action by Toy that forced upon the officer a split-second decision and supported the arrest as immediately necessary and lawful. Toy slammed the door shut and fled toward the rear of the laundry (the officer could see the flight through the glass in the door). If Toy had narcotics on the premises he could conceal or destroy them in an instant. See *Mattus* v. *United States,* 11 F. 2d 503, 504 (C.A. 9); *United States* v. *Kanceo,* 252 F. 2d 220, 222 (C.A. 2). He could also escape. In sum, Toy's action in fleeing, combined with Hom Way's accusation, constituted probable cause for the arrest of Toy at that moment. Toy's slamming of the door was no flight from a supposed robber. Toy made no claim of any such fear.[12] The admitted circumstances af-

[12] He testified, instead, that he had closed the door and gone to the rear of the laundry, admittedly taking "big steps" (*supra*, p. 4), and that the officers had thereafter suddenly crashed through the door. We disagree with petitioners' statement (Pet. Br. 4) that "Toy testified he then" locked the

ford no explanation of the flight to the rear other than guilt. There was only a single agent, standing in daylight at the door of a laundry on a public street, with no weapons, and who had made no attempt to enter. The door was not slammed when the man at the door inquired for laundry; it was slammed when the officer's badge was exhibited.

In these circumstances, the officer surely had cause to believe Toy guilty; unexplained flight from an officer is strong indication of guilt. *Husty* v. *United States,* 282 U.S. 694, 701; *Brinegar* v. *United States,* 338 U.S. 160, 166, fn. 7; *Wrightson* v. *United States,* 236 F. 2d 672, 673 (C.A.D.C.); *Jones* v. *United States,* 131 F. 2d 539, 541 (C.A. 10); *Levine* v. *United States,* 138 F. 2d 627, 629 (C.A. 2); *United States* v. *Heitner,* 149 F. 2d 105, 107 (C.A. 2); *People* v. *Martin,* 46 Cal. 2d 106, 108; *People* v. *Maddox,* 46 Cal. 2d 301, 303; *Allen* v. *McCoy,* 135 Cal. App. 500, 507; *People* v. *Dewson,* 150 Cal. App. 2d 119, 129; 2 Wigmore, *Evidence* (3d ed., 1940), sec. 276. As stated in *Green* v. *United States,* 259 F. 2d 180, 182 (C.A.D.C.), certiorari denied, 359 U.S. 917:

> The appellant, then, made his own decision [of flight], not because of threatened assault, for he proved none. His effort to escape impelled his attempted illegal course * * * before the very eyes of the officers. The arrest was proper.

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front door and "as he started toward his living quarters" the agents, about seven in number, "broke in and pursued him * * *." This was only one of three versions Toy told, another being, "as I tried to close the door," the agent forced the door (R. 38), and the third being that he heard the crash when he "had gone back to [his] bedroom" (R. 47).

Or, as stated in *People* v. *Howard*, 173 Cal. App. 2d 787, 791, where the information had come from theretofore unknown members of a check-passing group:

> [T]he act of the man in slamming and locking the door indicated that the man was fleeing from and attempting to prevent the officer from apprehending him. The information which the officer had received and the conduct of the appellant in the presence of the officer constituted probable cause to arrest appellant. * * *

And see *Henry* v. *United States*, 361 U.S. 98, 103, distinguishing its facts from a case of "fleeing men or men acting furtively".[13]

The composite of elements here is as persuasive of guilt, we believe, as the circumstances in numerous decisions that have established probable cause upon corroboration of prior information by factors less

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[13] *Miller* v. *United States*, 357 U.S. 301, cited by petitioners to the effect that slamming a door and running did not justify entry (Pet. Br. 9), is inapposite, upon the facts stated in *Miller*—there, this Court questioned whether the running was from police, since it was doubted whether the concededly low-voiced enunciation of the word "police" had been heard. There was not, as here, an exhibiting of the official badge, and the officers were not in such uniform as would dispense with the need to show a badge (357 U.S. at 311). *United States* v. *Castle*, 138 F. Supp. 436 (D.D.C.), also cited by petitioners (Pet. Br. 9), did not involve flight. *Gascon* v. *Superior Court*, 169 Cal. App. 2d 356, did not embody prior events, as here, to give significance to the flight. *Badillo* v. *Superior Court*, 46 Cal. 2d 269, similarly lacked a background of prior events, as the prosecution there was still relying on the California non-exclusionary rule as to evidence (see pp. 272-273). *People* v. *O'Neill*, 10 Cal. Rptr. 114 (Dist. Ct. of App., Cal.), involved an admission by the officer that he had no information as to the reliability of his informant (p. 116), and the circumstances provided a possible innocent basis for the closing of the door.

persuasive than flight. In some cases, greater or less strength was to be found in the source of the information, and in others greater or less strength was to be found in the observations of the officers. In all the cases, of course, alternative innocent explanations of what was observed could have been hypothesized, *e.g.*, the surreptitious handing over of an envelope could, of course, be innocent. But the mere possibility of an innocent explanation for what was observed is not the test of probable cause; innocence can be conjectured or devised for virtually any act or movement. The test is a prudent evaluation of the totality of elements. See *supra*, pp. 20–23. We submit that the combination of circumstances here adds up to sufficient probable cause for arrest. See, *e.g.*, *Draper* v. *United States*, 358 U.S. 307; *Agnello* v. *United States*, 269 U.S. 20, 28, 31; *Rodgers* v. *United States*, 267 F. 2d 79 (C.A. 9); *Christenson* v. *United States*, 259 F. 2d 192 (C.A. D.C.); *United States* v. *Garnes*, 258 F. 2d 530 (C.A. 2); *Shepherd* v. *United States*, 244 F. 2d 750 (C.A. D.C.), reversed on other grounds *sub nom. Miller* v. *United States*, 357 U.S. 301; *United States* v. *Naples*, 192 F. Supp. 23 (D. D.C.), pending on appeal, C.A. D.C., No. 16436.

3. *The arrest of Toy was not rendered unlawful by the absence of affirmative evidence that the officers stated his purpose to arrest him.*

Petitioners contend (Pet. Br. 9) that the absence of affirmative evidence that the officer stated his purpose to arrest Toy brought the case within the prohibition of *Miller* v. *United States*, 357 U.S. 301.

The language of the *Miller* opinion itself answers this contention. This Court there noted decisions "holding that justification for noncompliance [with the requirement of statement of purpose] exists in exigent circumstances, as, for example, when the officers may in good faith believe * * * that the person to be arrested is fleeing or attempting to destroy evidence. *People* v. *Maddox*, 46 Cal. 2d 301, 294 P. 2d 6." The Court then stated that whether the rule admits of such exception "is not a question we are called upon to decide in this case" (*id.*, 309), and continued (357 U.S. at 310), "It may be that, without an express announcement of purpose, the facts known to officers would justify them in being virtually certain that the petitioner already knows their purpose so that an announcement would be a useless gesture. Cf. *People* v. *Martin*, 45 Cal. 2d 755, 290 P. 2d 855; Wilgus, *Arrest Without a Warrant*, 22 Mich. L. Rev. 541, 798, 802 (1924)."

The facts in *Miller* were very different from those in this case. In *Miller*, the police were not in uniform and the Court questioned whether the concededly low-voiced enunciation of the word "police" had been heard (357 U.S. at 311). Here, the officer showed his badge and stated, "I am a federal narcotics agent", before Toy slammed the door and ran (*supra*, pp. 24, 29–30). In *Miller*, 357 U.S. at 311:

> [Miller's] reaction upon opening the door could only have created doubt in the officers' minds that he knew they were police intent on arresting him. * * * [A]gent Wilson testified that "he wanted to know what we were doing

> there." This query, which went unanswered, is on its face inconsistent with knowledge. * * *

Here, there was no such query by Toy—he slammed the door and ran as soon as he knew he was confronted by a narcotic agent, without giving the agent an attempt to explain his purpose.

This case is governed, not by *Miller*, but by the authorities referred to in *Miller* as the basis for a possible exception. The forcing of entry here was necessary and lawful. In *People* v. *Maddox*, 46 Cal. 2d 301, referred to in *Miller* (*supra*, p. 34), the court said (p. 306):

> [S]ince the demand and explanation requirements of section 844 are a codification of the common law, they may reasonably be interpreted as limited by the common law rules that compliance is not required if the officer's peril would have been increased or *the arrest frustrated* had he demanded entrance and stated his purpose. (*Read* v. *Case*, 4 Conn. 166, 170 [10 Am. Dec. 110]; see Rest., Torts, § 206, com. d.). Without the benefit of hindsight and ordinarily on the spur of the moment, the officer must decide these questions in the first instance. When, as in this case, he has reasonable grounds to believe a felony is being committed and hears retreating footsteps, the conclusion that * * * the felon would escape if he demanded entrance and explained his purpose, is not unreasonable. * * * [Emphasis added.]

It was not until Toy's flight that the officer undertook to arrest Toy, and Toy's flight prevented the officer's advising him in specific words that he was to be ar-

rested. The officer was acting lawfully in pursuing Toy in order that the arrest would not be frustrated.[14]

C. PROBABLE CAUSE FOR THE ARREST OF PETITIONER WONG SUN WAS FURNISHED BY THE COMBINED, CONSISTENT STATEMENTS OF YEE AND PETITIONER TOY

1. Petitioners suggest (Pet. Supp. Br. 14) that the arrest of Wong Sun was unlawful because the officers relied upon narcotics obtained from and statements made by Yee at the time of Yee's arrest, claiming that the arrest of Yee was itself unlawful. The point has no merit.

No question was raised at the trial as to the lawfulness of the arrest of Yee *per se* and it is too late to raise one now. Nor is there any question as to the way in which the officers obtained the narcotics from Yee. Petitioners' suggestion that the agent's testimony that Yee "surrendered" the narcotics is "conclusionary" (Supp. Br. 14) is refuted by the record. On cross-examination, Agent Nickoloff was asked, "And you made a search of his premises, Johnny Yee's home or premises?". The officer replied, "No, I didn't actually make a search. He surrendered the nar-

[14] Toy testified that the officer pursuing him into the rear of the laundry ran across the bed in which Toy's wife and child were sleeping. Presumably this was intended to suggest misconduct in the manner of making the arrest, although the point was not articulated in argument. The officer testified that Toy had himself run across the bed to a nightstand into which he reached, and the officer, fearing a gun in the drawer, followed, drew his own gun, and handcuffed Toy. Petitioners offered the testimony of Toy's wife only "as to the condition of the door before and after the entry" (R. 48), and attempted no further development of the suggested misconduct beyond this tangential reflection on the officers.

cotics" (R. 66). This shows that the officer was distinguishing between a search and voluntary delivery. There is accordingly no basis in this record for a challenge to the arrest of Yee or the receipt of the narcotics.

Moreover, Yee's designation of Wong Sun as one of the suppliers of narcotics (the other being Toy) was not made at the time the officers were in Yee's home, but later, in the office of the Bureau of Narcotics. As we discuss generally *infra*, this voluntary statement, made after a period for reflection, represents an intervening independent act of volition which would not be tainted even if Yee's arrest were illegal. Yee's statement was accordingly a factor on which the officers could properly rely as one of the circumstances giving them probable cause to arrest Wong Sun.

2. It is without significance that the record does not show any prior acquaintance of the officers with Yee. His accusation of "Sea Dog" and Toy as the suppliers of the narcotics was significantly corroborated before the officers arrested Wong Sun on the morning of June 4. First, of course, Yee was not speaking without corroboration—his statement that he had been furnished heroin was substantiated by his actual possession. His statement that Toy had been one of the two who furhished the heroin was substantiated by Toy's similarly detailed knowledge of Yee's possession of the narcotics, as revealed in Toy's earlier statement to the officers. Yee's tie-in of "Sea

Dog" with Toy dove-tailed immediately thereafter with Toy's knowledge of the real name of "Sea Dog" (Wong Sun) and Toy's knowledge of where the latter lived. Further, the federal narcotics agent's familiar greeting to Wong Sun's wife by first name, before arresting him (*supra*, p. 6), warrants the inference that Wong Sun, who had a prior conviction for a narcotics offense, was known to the officer. The likelihood of recidivism in narcotics offenses is strong *Rodgers* v. *United States*, 267 F. 2d 79, 87 (C.A. 9); *Reyes* v. *United States*, 258 F. 2d 774, 785 (C.A. 9). This element was, at the least, a further factor properly to be taken into account in the judgment of the officers that Wong Sun was probably guilty of a narcotics offense, as asserted by Yee earlier that morning.

In short, both Toy and Wong Sun were arrested upon reasonable grounds for belief by the officers that the two had committed a narcotics offense. If the arrests were lawful, the judgment of the court of appeals below can properly be sustained upon that basis, without more. However, since the court of appeals upheld the convictions on the ground that they rested, not upon evidence seized in the arrests, but upon the actual finding of the heroin in Yee's house, and the voluntary statements and confessions of petitioners and Yee, we proceed now to discuss the validity of the judgment below upon that basis.

II

ASSUMING THAT THE ARRESTS WERE ILLEGAL, THE EVIDENCE UPON WHICH PETITIONERS WERE FOUND GUILTY WAS ADMISSIBLE BECAUSE IT WAS THE PRODUCT OF INTERVENING VOLUNTARY ACTS ON THE PART OF PETITIONERS AND A THIRD PARTY

On the assumption that the arrests were illegal, petitioners contend that all the evidence obtained after those arrests must be deemed the "fruit of the poisonous tree" and therefore inadmissible. The court below rejected this contention, holding that the voluntary statements by petitioners—by Toy at the time of his arrest and by both, later, after arraignment—were sufficiently independent so that they could not be said to be the product of the arrests. If this question need be reached, we submit that the decision of the court of appeals is correct.

There can be no doubt that if evidence sought to be introduced is the true product of illegal government action it is not admissible in a federal prosecution. The Court, however, has never held nor said that any evidence which would not have been obtained but for the illegal conduct is automatically inadmissible. Rather, the test has been the proximity of the connection between the improper official activity and the particular evidence proffered by the government. Where the bond is direct and unbroken the rule of exclusion applies, but where the connection is attenuated or the nexus is cut by sufficient intervening conduct the evidence is acceptable. In our view, a voluntary decision by defendants (or third parties)

freely to give information to arresting officers, when in truth it is freely given, breaks the link; the resulting evidence is not then attributable to, or the product of, the illegal arrests. Such freely-given declarations are the product of a human being's voluntary choice to speak rather than to remain silent when he could freely decline to say anything.

1. The general rule is illustrated by *Silverthorne* v. *United States*, 251 U.S. 385, which laid down the "poisonous tree" doctrine. There, the government seized evidence, made photostats, and studied the documents. After the documents had been ordered returned as illegally seized, the government attempted by subpoena to have the evidence produced for use at a trial. In reversing a conviction for contempt for failure to honor the subpoena, this Court pointed out that knowledge of the existence and contents of the documents was the direct result of the government's wrongful action and held that the government could not thus profit from its own wrong. Suppression of evidence would have little meaning, the Court said, if such a direct product of illegal action could be introduced in evidence. Similarly, where officers, as the result of an illegal entry, observe incriminating facts, testimony as to their observations is the direct product of the illegal entry and is excludable. *E.g.*, *McGinnis* v. *United States*, 227 F. 2d 598 (C.A. 1) (cited by petitioners). There is obviously a direct connection between the illegal entry and the officers' observations.

This Court also applied the "poisonous tree" doctrine in *Nardone* v. *United States*, 308 U.S. 338, holding that evidence would be inadmissible, not only if obtained directly from illegal wire-tapping, but also if obtained from leads or clues stemming from the wire-tapping. The Court indicated, however, that the connection between the illegal official conduct and the evidence must be direct and adequate. The opinion carefully pointed out, with respect to the relationship between the officers' misconduct and the government's proof (308 U.S. at 341):

> As a matter of good sense, however, such connection may have become so attenuated as to dissipate the taint. * * * [15]

2. On the other hand, the Court has recognized that, even though illegal action by government officers has in some degree contributed to the obtaining of evidence ultimately used, nevertheless, if that evidence represents primarily an act of human free will, the evidence is admissible. In *United States* v. *Bayer*, 331 U.S. 532, 540–541, the Court held admissible a confession voluntarily given, without regard to

[15] An example of attenuation, even without an intervening act of free will on the part of the defendant, is furnished by *Goldman* v. *United States*, 316 U.S. 129, 134–135, where an earlier trespass in an office to install a listening device resulted in failure of the device. The Court rejected the contention that a later installation, involving no trespass, was tainted by the earlier conduct, even though it was contended that the trespass, and what was learned thereby, was of assistance in placing the second installation. The Court relied upon the findings that the trespass did not aid "materially" in the use of the second device.

whether a confession six months earlier had been lawfully or unlawfully obtained. The Court said:

> Of course, after an accused has once let the cat out of the bag by confessing, no matter what the inducement, he is never thereafter free of the psychological and practical disadvantages of having confessed. He can never get the cat back in the bag. The secret is out for good. In such a sense, a later confession always may be looked upon as fruit of the first. But this Court has never gone so far as to hold that making a confession under circumstances which preclude its use, perpetually disables the confessor from making a usable one after those conditions have been removed. The *Silverthorne* and *Nardone* cases, relied on by the Court of Appeals, did not deal with confessions but with evidence of a quite different category and do not control this question. * * *

We believe that it is the concept of an intervening independent act of a free will—the defendant, as a human being, can choose to speak or to remain silent—which furnishes the rationale for the rule (which pertains generally in state and federal courts) that a statement or confession voluntarily made during detention, without compulsion and without undue delay in arraignment, is not rendered inadmissible by the illegality of the original arrest. *Smith* v. *United States*, 254 F. 2d 751, 758–759 (C.A. D.C.), certiorari denied, 357 U.S. 937; *United States* v. *Walker*, 197 F. 2d 287, 289–290 (C.A. 2), certiorari denied, 344 U.S. 877; *Gibson* v. *United States*, 149 F.

2d 381, 384 (C.A. D.C.), certiorari denied *sub nom. O'Kelley* v. *United States*, 326 U.S. 724.[16]

3. Where, at the time and place of an illegal arrest or an illegal search, a defendant makes statements which are themselves evidence or which lead to other evidence, the situation lies between those we have just discussed. On the one side, the illegal official action is still occurring and its effects may, to a greater or less degree, still be operative. On the other, the statements, if not coerced, do represent an independent intervening act of free will on the part of the defendant. As Judge (later Chief Justice) Vinson said in *Nueslein* v. *District of Columbia*, 115 F. 2d 690, 692 (C.A. D.C.), there "exists the heaviest cross-fire between the legal significance of voluntary declarations, and a completely unlawful entry into a home.' It is not always easy to decide whether the statements are truly the product of the illegal government action or result from an intervening independent act of volition. But it seems clear to us that there should be no general rule barring all statements or admissions made in connection with or after an illegal arrest. For instance, if an individual arrested without probable cause while walking on a busy street blurts out at once in remorse—before the officer says anything more than "I arrest you"—that he is guilty of stealing certain goods and will make restitution, it would seem unwise to bar that volun-

[16] The state, as well as the federal, cases are collected in Kamisar, *Illegal Searches or Seizures and Contemporaneous Incriminating Statements: A Dialogue on a Neglected Area of Criminal Procedure*, University of Illinois Law Forum (1961) 78, 81, fn. 16.

teered confession or the evidence of larceny obtained as a result of the confession. Human beings do normally have power to control their own speech, and, when they do choose to speak, their words, if voluntary, cannot be simply equated, without more, to intangible objects observed or discovered in the course of an illegal arrest or search.

To us, what the existing decisions [17] show is that the question whether a statement made at the time of an illegal entry or illegal arrest should or should not be deemed admissible cannot be settled by any fixed rule but must essentially represent a judgment, based on all the circumstances, as to whether the illegal government action or the voluntary act of the defendant is the primary motivating force behind the production or discovery of the evidence. The leading case holding that voluntary admissions at the time of an invalid search are admissible is *Quan* v. *State*, 185 Miss. 513.[18]

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[17] For a list of cases, see *Nueslein* v. *District of Columbia*, 115 F. 690, 691–692 (fns. 2 and 3). Other cases are noted in Kamisar, *op. cit. supra*, at page 83, fn. 22.

[18] The court, after pointing out that an illegal search resulted in barring from evidence all knowledge acquired by officers through their senses during the course of the search, any statements heard when the speakers were unaware of the presence of the officers, and any statements made under circumstances rendering them involuntary, went on to say (185 Miss. at p. 520):

> But there there is no such an essential connection between an illegal search —wherein the illegality consists solely in the want of a valid search warrant—and statements freely and voluntarily made to the officers during the course of that search as to bar such free and voluntary statements. Even though a search is being made, and although it be illegal because of the invalidity of the search

Yet, under other circumstances, where a confession that there was whiskey in a suitcase came as the result of an officer's illegally taking the suitcase from a moving train, the Mississippi court held that the *Quan* rule did not apply and that the admission should not have been allowed in evidence. In the latter case the illegal seizure left the defendant no choice to give or withhold the information; the officer had already seized it. *Harris* v. *State*, 209 Miss. 183. The California courts, since adopting the rule of exclusion, have held inadmissible admissions made under the actual compulsion of an illegal search or arrest. *People* v. *Dixon*, 46 Cal. 2d 456 (1956); *People* v. *Macias*, 180 Cal. App. 2d 193 (1960). Yet California has held that this rule does not apply to an attempt at bribery made when a person was illegally arrested. *People* v. *Guillory*, 178 Cal. App. 2d 854. Thus, even California, which has applied stringent rules in this field, does not hold inadmissible *any* statement by the defendant which would not have been made but for the unlawful arrest; where the statement is the deliberate and voluntary act of the defendant, California has permitted it to be used.

4. Where a defendant makes statements directly related to things unlawfully seized, the unlawful seizure may well be considered the primary force behind

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warrant, the party whose premises are being searched may remain wholly silent, if he chose so to do. And, on the other hand, any responsible and competent person is at liberty to speak as against himself or against his own interests at any time or place or under any and all circumstances, so long as he freely and voluntarily does so.

the statement—nothing else appearing. As the Ninth Circuit phrased it in *Takahashi* v. *United States*, 143 F. 2d 118, 122, "all declarations and statements under the compulsion of the things so seized, are affected by the vice of primary illegality." Cf. however, *Quan* v. *State*, discussed *supra*; *Rohlfing* v. *State*, 230 Ind. 236. The situation is quite different where as here (in the case of petitioners) nothing is found and the defendant thus has nothing to explain away.

The decision in *Nueslein* v. *District of Columbia*, 115 F. 2d 690 (C.A.D.C.), held that, even though nothing was found after an illegal entry, statements made during the illegal entry were the result of an illegality and therefore inadmissible. Officers, investigating a misdemeanor (an accident in which a taxicab struck a parked car), went to the home of the taxicab owner and entered the home without a warrant and without permission of the owner. The owner admitted that he had been driving the taxi and, since he appeared to the officers to be drunk, the officers placed him under arrest. In holding excludable the admission by the defendant that he was driving the taxicab at the time of the accident, the court of appeals, noting that only a misdemeanor was involved, stressed the desirability of vindicating the right to privacy of a home and ruled that the effective way of protecting that right was "to dissolve the evidence that the officers obtained after entering and remaining illegally in the defendant's home." 115 F. 2d at p. 695. This decision goes far in connecting the admissions with the illegality since the illegal entry in no sense compelled the owner to talk. Even so, that decision does not go as

far as would be necessary in this case to hold inadmissible and unusable the statement made by petitioner Toy. In *Nueslein* the admissions made by the taxicab owner were admissions of guilt as to the very act which prompted the officers to make the illegal entry; they were also made while the man appeared to be intoxicated, not in full possession of his faculties. Here, petitioner Toy, although knowing that the officers had found no narcotics in his house or on his person, deliberately sent them to Johnny Yee in order to divert suspicion from himself. Toy saw an opportunity to sidetrack the officers, and consciously chose to do so.

For this reason, we think the statements in this case are a significant step removed from the *Nueslein* case and that that step is sufficient for the ruling here to fall on the side of admissibility. The motivating force behind Toy's statement that he knew Yee had narcotics was Toy's own voluntary act of deciding to give that information. Nothing in the entry by officers, nothing the officers found, would have sent them to Yee. The information communicated by the officers to Toy that Hom Way had named Toy as a source of narcotics in no way stemmed from the illegal entry. And it was Hom Way's information which caused Toy to send the officers to Yee. It later turned out that Toy's scheme to divert the agents failed, but at the time he evidently hoped to clear himself. This led to his voluntarily choosing to speak—and his words became the trail to new evidence. In short, petitioner Toy would now

have the courts bar evidence that he himself deliberately uncovered.

The present situation is much closer to the bribery case which was before the California court in *People* v. *Guillory*, 178 Cal. App. 2d 854, *supra*, than it is to *Nuesleiv*. There, the defendant claimed that the offer of the bribe would not have been made except for the illegal arrest. The court noted that nothing in the arrest compelled the bribe and held that the illegal entry and arrest had nothing to do with the bribery "except as they furnished the setting for it." So here, the illegal entry may have furnished the setting for informing Toy of Hom Way's accusation, but the entry did not cause Toy to send the officers to Yee.

The factual pattern here is also analogous to that before the Second Circuit on the issue of consent in *Burgos* v. *United States*, 269 F. 2d 763, 766 (C.A. 2), certiorari denied, 362 U.S. 942. In *Burgos*, after a defendant had been arrested for illegal entry into the country as an alien, he was asked about narcotics and handed over a small glassine envelope saying that it was for his own use. Subsequently a search disclosed a large quantity of narcotics. Despite the fact that, as petitioner argues, the courts have generally, particularly in recent years, tended to find that consent to a search at the time of arrest is not voluntary,[19] the district court and the court of appeals found that Burgos had voluntarily turned over the glassine envelope. The court of appeals pointed out that he was

[19] See *United States* v. *Arrington*, 215 F. 2d 630 (C.A. 7); *Catalanotte* v. *United States*, 208 F. 2d 264 (C.A. 6); *Judd* v. *United States*, 190 F. 2d 649, 651 (C.A.D.C.).

trying to use the glassine envelope as a cover-up, and that, instead of characterizing his behavior as an admission, it was far more plausible to interpret it as an attempt to ingratiate so as to convince the agents that he was only a "small time user" and might well be released in exchange for a bribe. So here, petitioner Toy tried to divert the agents by sending them to Yee. The propelling force behind the discovery of the narcotics at Yee's house was Toy's own act in sending the agents to Yee. Since it was Toy's deliberate and voluntary act which caused the officers to go to see Yee, the evidence recovered from Yee should be deemed to be Toy's independent responsibility, not the product of illegal government action in entering Toy's house.

5. Petitioners seek to invalidate not only Toy's statement at the laundry, but Yee's voluntary delivery of the narcotics and his unanticipated and independent statement in which he implicated Toy as well as Wong Sun, and even the later, disconnected, full confessions of Toy and Wong Sun, made after an interval of 5 days (after arraignment).

As pointed out *supra* (pp. 36–37), nothing with respect to Yee's surrender of the narcotics or accusation of Wong Sun and Toy involved any unlawful conduct of the officers. No search was made, and Yee's designation of Wong Sun and Toy as the persons who brought the narcotics to Yee's house was voluntarily made at a later time. He did not make this accusation on the spur of the moment when he delivered the narcotics to the officers at his house, but subsequently at the office of the Bureau of Narcotics,

when there had been an interval of time in which to consider whether to disclose his suppliers—an interval of time in which to make an independent voluntary determination as to cooperation or non-cooperation with the officers.

As for the full confessions of the petitioners, which were wholly voluntary and made after arraignment, they were clearly admissible under the well settled rule, noted *supra* (pp. 41–43), that a later voluntary confession is admissible even if the arrest was illegal.

III

PETITIONERS' CONFESSIONS WERE CORROBORATED BY SUBSTANTIAL ADDITIONAL EVIDENCE

Petitioners' confessions, as we will point out in detail below, showed that they transported heroin on or about June 1. The independent testimony of the officers showed the delivery of 27 grams of heroin to them by Yee at Yee's house, and showed petitioner Toy's detailed familiarity with the location of Yee's room in the house and even the usual time for the departure of Yee's mother from the house (R. 63–64). In addition, Yee—in other respects a recalcitrant witness—confirmed his acquaintance with both petitioners Wong Sun and Toy (R. 20). He also testified to an earlier, corroborating statement to the officers, made under oath, that Wong Sun and Toy had come to his house on June 1, prior to midnight, and on June 3, between 11 p. m. and midnight, but he alleged at the trial that his earlier statement had been false (R. 29–30). Taken together, these items of

evidence outside the confessions furnished adequate corroboration.

A. CORROBORATION OF A CONFESSION REQUIRES ONLY EVIDENCE THAT WILL TEND TO ESTABLISH THE TRUSTWORTHINESS OF THE CONFESSION, AND DOES NOT REQUIRE EVIDENCE SUFFICIENT TO ESTABLISH THE CORPUS DELICTI INDEPENDENTLY OF THE CONFESSION

The special problem with respect to reliance on a confession arises out of concern whether a particular confession may be the product of "the aberration or weakness of the accused under the strain of suspicion" (*Opper* v. *United States*, 348 U.S. 84, 90). But if facts are shown, by evidence other than the confession, demonstrating that the confession is not a fantasy warped by the aberration or weakness of the accused, then the finder of fact—here, the trial judge—may properly attribute the confession to the familiar motivation of an accused person who realizes that he has been caught and may as well tell the truth. The confession may then be weighed upon the basis "that one who is innocent will not imperil his safety or prejudice his interests by an untrue statement" (*Hopt* v. *Utah*, 110 U.S. 574, 585).

The limited extent of the corroboration required has been clearly marked by this Court. The essence, as stated in *Opper, supra*, is that the independent evidence should "tend" to establish the trustworthiness "of the statement"; and it "is sufficient if the corroboration supports the essential facts admitted sufficiently to justify a jury inference of their truth" (348 U.S. at 93).

It is equally clear that "the corroborative evidence need not be sufficient, independent of the statements, to establish the corpus delicti" (*Opper* v. *United States*, 348 U.S. 84, 93) or, as elaborated in *Smith* v. *United States*, 348 U.S. 147, 156 (emphasis added):

> It is agreed that the corroborative evidence does not have to prove the offense beyond a reasonable doubt, or even by a preponderance, as long as there is substantial independent evidence that the offense has been committed, and the evidence as a whole proves beyond a reasonable doubt that defendant is guilty. [citing decisions]. In addition to differing views on the substantiality of specific independent evidence, the debate has centered largely about two questions: (1) whether corroboration is necessary for all elements of the offense established by admissions alone [comparing decisions], and (2) whether it is sufficient if the corroboration merely fortifies the truth of the confession, without independently establishing the crime charged. [comparing decisions]. We answer both in the affirmative. All elements of the offense must be established by independent evidence *or* corroborated admissions, but one available mode of corroboration is for the independent evidence to bolster the confession itself and thereby prove the offense "through" the statements of the accused. * * *

While it is concededly difficult to match the facts of the various cases in which this type of question arises, the independent testimony here is at least as corroborative as that held sufficient in other cases

where the independent evidence was admittedly insufficient to prove the whole case in itself but was found to be enough to indicate that the various admissions were reliable. Thus, in *Smith* v. *United States*, 348 U.S. 147, quoted above, an admission that the taxpayer had small net worth at the commencement of an income-tax prosecution period was held sufficiently corroborated by such nondispositive but supporting facts as recitals of low income in tax returns prior to the net worth date. The recitals in earlier returns might well have been falsified but they nevertheless were consistent with the statement of a low net worth. Similarly, the employment of the taxpayer at low pay prior to the net worth date was corroborative of low net worth, although the low pay would not preclude substantial assets held from a long time before, which might have negated a low net worth. Corroboration was also found in the taxpayer's conduct during the prosecution period, in the form of large expenditures and a new racing-news business in which he kept no records (*id.*, 157–159).

In *Opper* v. *United States*, *supra*, 348 U.S. 84, the accused's admission that he paid the money to a government official (although in the admission it was asserted that this was only a loan) was held corroborated by a check drawn by the defendant, together with the records of a concurrent long-distance call to Opper's home from the employee's home, and an airline ticket in the employee's name to Opper's city. There, again, any or all of the cor-

roboration *could* have been explained away upon various hypotheses, but the facts did serve to indicate that the admission by the accused was no mere fantasy or aberration.[20]

We turn now to the corroboration of the confessions in the present case.

B. WONG SUN'S CONFESSION AND ITS CORROBORATION

1. Wong Sun's confession stated the following: He met petitioner Toy at Marysville, California, about the middle of March, 1959, during a Chinese celebration. They returned to San Francisco together and discussed the possible sale of heroin. Wong Sun informed Toy that he could get a "piece" (28 grams, *supra*, p. 7) from one "Bill" for $450. Shortly after, Toy told Wong Sun he wanted a piece for "Johnny". Wong Sun knew Johnny only through Toy. Wong Sun obtained the heroin, and did so again on about 7 or 8 additional occasions, on one of which the heroin was for someone other than Johnny. On several occasions after obtaining the first piece, Wong Sun drove with Toy to Johnny's house, 606—11th Avenue (in San Francisco), and Toy would deliver the heroin to Johnny and the three would smoke some of the

[20] In *United States* v. *Carminati*, 247 F. 2d 640 (C.A. 2), certiorari denied, 355 U.S. 883, the admission of a defendant in October 1956 to one Botto that he had supplied one Russano with heroin was held sufficiently corroborated by a statement of Russano to Botto a year before, in September or October 1955, that the defendant was his supplier. There was also a discovery of Banker's Trust Company envelopes, in the defendant's possession, of the type used in the particular narcotics conspiracy (*Id.*, 642, 644).

heroin. Johnny paid Toy $100 for each piece. On three other occasions Wong Sun and Toy went to Johnny's without bringing heroin, and smoked heroin there and obtained some for themselves.

"About" four days before the arrest—*i.e.*, on May 31, with post-midnight events occurring on June 1—Toy gave Wong Sun $450 and, after the latter obtained the heroin, Toy phoned Johnny, and Toy and Wong Sun drove to Johnny's house at about midnight and Toy gave the heroin to Johnny in a rubber contraceptive enclosed in a small brown bag.

On the night before the arrest, before 11 p.m., Toy phoned Johnny, and the two went to Johnny's to smoke heroin for half an hour. They also obtained one "paper" for their own use later.

2. Upon the basis of further substantial evidence at the trial, both the trial judge, as trier of the fact, and the court of appeals below were clearly entitled to conclude that this confession was no mere fantasy or aberration and was properly to be weighed as evidence. The critical portion of the confession—the statement that Wong Sun transported an ounce of heroin from his source of supply to Toy on the night of May 31, 1959, and that he and Toy then transported the heroin to Yee at Yee's house at about midnight—is firmly substantiated by the discovery of 27 grams of heroin at Yee's house on the morning of June 4. That possession was attested in the separate testimony of Agent Nickoloff and by actual production of the heroin in court. No effort was made by petitioners at the trial to ascribe the heroin to any other source.

The absence of a part of the ounce, and the division of the heroin into several containers after being brought to Yee's house in one container, substantiate the further portion of Wong Sun's confession that he and Toy had gone to Yee's house again on the night of June 3 and smoked heroin and taken one "paper" for their later use. If the entire ounce had remained in Yee's hands when the officers arrived, there would have been a question as to the source of the heroin smoked and taken by Wong Sun and Toy on the night of June 3. With the elimination of a gram, Wong Sun's confession remains consistent with the evidence delivered to the officers.

The statement in Wong Sun's confession placing Toy at Yee's house on the night of June 3, was further substantiated in Agent Nickoloff's testimony that Toy had admitted to him on June 4 that he had been at Yee's house the night before.

In addition, the separate testimony of Yee, despite his obvious hostility to the government, substantiated other facts stated in Wong Sun's confession. Yee admitted that he knew Wong Sun and he identified him in the courtroom. Consistently with Wong Sun's statements as to the recency and limited nature of his acquaintance with Yee, Yee testified that he had known Wong Sun "just this year", under the nickname "Sea Dog", and did not know whether Wong Sun was a sailor or how the nickname originated. This compared accurately, as is discussed below, with Yee's testimony concerning a longer and closer acquaintance with Toy.

The trial court was not required to give credence to Yee's testimony that Wong Sun had not been at his house, for this testimony was impeached by Yee's own admission on the stand that he had given a contrary statement on June 9, under oath, that Wong Sun and Toy had come to his house on the night of June 1 and again on the night of June 3—the nights specified in Wong Sun's confession.[2]

In sum, the 27 grams of heroin surrendered by Yee at Yee's house on June 4 itself attested that narcotics had been transported to the house—narcotics that cannot be legally imported and for the manufacture of which no opium can be legally imported. Wong Sun's confession, shown to be reliable by several aspects of evidence *aliunde*, stated that the heroin had been brought by him and Toy. Moreover, in transporting the heroin, Wong Sun was necessarily

[2] While certain remaining evidence *aliunde* the confession was introduced only on *voir dire* it may be noted here for the limited purpose of demonstrating that the district judge, as trier of the fact, was not on notice, from his additional hearing of the *voir dire* testimony, of anything impugning the trustworthiness of the confession. To the contrary, the *voir dire* testimony afforded persuasive corroboration of Wong Sun's confession. Agent Nickoloff testified that Yee, on the morning of his arrest on June 4, had named Sea Dog (Wong Sun) and Toy as the persons who had brought "the narcotics which Johnny Yee surrendered" to Yee's home approximately on the first of June (R. 90). Moreover, Toy further attested the degree of his acquaintance with Wong Sun by leading the officers to Wong Sun's home (R. 90). As to the portion of Wong Sun's confession asserting his ability to obtain heroin, the explanation appears in his prior experience—he stipulated, at the trial, that he had already been once convicted of a narcotics offense. (R. 89).

in possession of the heroin for a substantial interval of time sufficient to bring into effect the statutory presumption of guilty knowledge derived from possession. Petitioner's reliance (Pet. Br. 28) on *United States* v. *Landry*, 257 F. 2d 425 (C.A. 7), is misplaced. Landry's admission was rejected, not for lack of corroboration, but for its failure to prove what it sought to prove, *i.e.*, possession (*id.*, 431). The government there adduced an admission by the defendant that he *owned* the narcotics that were found in the possession of another person (*id.*, pp. 430–431). But the statute required possession rather than ownership in order to raise a prima facie presumption of a violation. Here that issue is not present—Wong Sun's confession admitted transportation of the heroin from Bill to Toy and to Yee and *a fortiori* the confession admitted the possession intrinsic in such transportation.

Every necessary element of Wong Sun's offense was thus proved beyond a reasonable doubt by the procedure approved in *Smith* v. *United States*, 348 U.S. 147, 156 (*supra*, p. 52)—"the independent evidence to bolster the confession itself and thereby prove the offense 'through' the statements of the accused".

C. TOY'S CONFESSION AND ITS CORROBORATION

Toy's confession, unlike that of Wong Sun, shows deliberate and ingenious effort on his part to withhold some of the facts. Like the accused in *Opper* v. *United States*, *supra*, 348 U.S. 84, Toy obviously sought to admit only what he thought could be proved

against him by other evidence. But the statements in his confession were sufficiently corroborated to warrant consideration of his confession as evidence. What he failed to realize was that the combination of what he admitted, together with what appeared in evidence *aliunde* and what was properly inferable from the totality of facts, was sufficient to prove such participation by him in a narcotics transaction as to establish his guilt beyond a reasonable doubt.

1. Toy's confession admitted the following: He first met Wong Sun, known to him as "Sea Dog", about three months before June 5, 1959, at Marysville, California, during a Chinese holiday. Toy drove him back to San Francisco. Sometime during April or May of 1959, Wong Sun asked Toy to drive him to the home of Johnny Yee, at 11th and Balboa Streets (in San Francisco), first asking Toy to phone Johnny that they were coming. Wong Sun there delivered to Johnny a paper package of heroin and, upon Toy's request, "they" gave him some which he smoked. Wong Sun paid Toy $15 for driving him to Johnny's house. Toy drove Wong Sun to Johnny's house "about 5 times altogether," each time receiving $10 or $15 and enough heroin for 3 or 4 cigarettes.

The confession indicates that the last time Toy drove Wong Sun to Yee's house was on June 2. The specific language is "last Tuesday, May 26, 1959", but "last Tuesday", whether viewed from June 5, a Friday, or June 9, a Tuesday (whichever was the date of the confession), could only have been June 2, according to the 1959 calendar. What apparently occurred when the statement was made was a too hasty

glance at the calendar for the date—the particular date could be confused, whereas "last Tuesday" was not likely to be confused with a Tuesday 10 or 14 days in the past. Moreover, the confession continues with immediate reference to "Wednesday night, June 3", when Toy phoned Johnny that he didn't "have anything" and was coming out "pretty soon". When he arrived, Johnny gave him—"just out of friendship"—a paper of heroin sufficient for 5 or 6 cigarettes, without any money given or asked. "He has given me heroin like this quite a few times. I don't remember how many times".

Toy had "known Hom Wei [the original informer] about 2 or 3 years but I have never dealt in narcotics with him. * * * The only connection I have now is Johnny Yee."

2. This confession was corroborated in numerous respects by substantial evidence. As in the case of Wong Sun's confession, when Toy spoke of delivery of heroin at Yee's house he was not spinning a fantasy—the testimony of Agent Nickoloff that Yee had 27 grams of heroin at his house on the morning of June 4, and the presentation of the heroin in court provided firm substantiation for this critical aspect of Toy's story. We recognize that the literal language of Toy's confession does not embody an outright statement that heroin was delivered on the particular Tuesday night. The statement is only that Toy drove Wong Sun to Yee's house on that night, but the phrasing, in its context as the account

of the last of a series of visits to Yee's house, shows that this was another instance of delivery of heroin. The statement is preceded by the sentence, "Each time [I have driven Wong Sun to Yee's] Wong Sun gave me $10 or $15 for doing it and also, he gave me a little heroin—enough to put in 3 or 4 cigarettes". Moreover, the confession is specific that, on the first of this series of well-paid trips to Yee's house, heroin was delivered to Yee. The clear effect is that heroin was delivered at Yee's house on Tuesday night, and the supporting evidence of the federal agent attests that there was heroin at Yee's house on Thursday morning.

Various other elements of the confession were corroborated. Toy admitted a series of visits to Yee's house. It was reasonable to conclude that this admission was true in the light of Toy's very detailed familiarity with the house—as disclosed in the testimony of Agent Nickoloff as to what was said when Toy sought, on June 4, to divert the officers to Yee as the seller of narcotics.

The statement in Toy's confession specifically placing him at Yee's house on the night of June 3 was further substantiated in Agent Nickoloff's testimony that Toy admitted to him on June 4 that he had been at Yee's house the night before. Toy also stated, in his confession, that Yee gave him heroin out of friendship. The aspect of friendship was supported in Yee's testimony at the trial. He said that he had known Toy since 1951 or 1952 and that Toy and

wife and children had been present at Yee's housewarming party (R. 20–21).[22]

Accordingly, the confession was properly considered by the trial judge as substantiated. Despite Toy's obvious effort to exculpate himself, his cleverness in this respect, as in the case of *Opper* v. *United States, supra*, 348 U.S. 84, fell short of success. For Toy in his admissions, while seeking to paint Wong Sun as the seller and transporter of the heroin to Yee's house, admitted accepting enough heroin on June 1 for 3 or 4 cigarettes, and a bindle of heroin on June 3 "enough for 5 or 6 cigarets", to say nothing of Toy's aiding and abetting of Wong Sun in the transportation. See 18 U.S.C. 2. Toy thus admitted possession of part of the heroin on June 1 and therefore was subject to the statutory presumption of guilty knowledge arising from possession of narcotics. The evidence of the amount of heroin at Yee's house on June 4 clearly corroborated Toy's admission of the availability of heroin for delivery to him at Yee's house on or about June 1.

The trial judge was not required to believe the entirety of either Toy's confession or that of Wong Sun. In *Opper* v. *United States, supra*, 348 U.S. 84,

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[22] It may be pointed out also, as with respect to Wong Sun's confession, that the district judge, as trier of the fact, was not presented with any facts in the *voir dire* testimony that would impugn the reliability of Toy's confession. To the contrary, on *voir dire*, the evidence confirmed Toy's acquaintance with Wong Sun—it was Toy who found Wong Sun's residence for the officers. And Yee confirmed, in his statement to the officers, the visit of Wong Sun and Toy to his house—it was Sea Dog "together with James Wah Toy" who had brought "the narcotics which Johnny Yee surrendered" (R. 90).

the admission of a payment to a government official was accepted as true but Opper's statement that this payment was only a loan was not required to be accepted. So, here, the trial judge could consistently find that, on or about June 1, Wong Sun had, at the least, transported heroin from his source "Bill", and that Toy had, at the least, possessed in Yee's house heroin, the transportation of which he had aided. This much of the confessions was sufficient proof of guilt, and (as we have pointed out) the confessions were adequately corroborated by the introduction in evidence of the 27 grams of heroin, and by the testimony of the officers and of Yee.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment below should be affirmed.

ARCHIBALD COX,
Solicitor General.
HERBERT J. MILLER, JR.,
Assistant Attorney General.
BEATRICE ROSENBERG,
J. F. BISHOP,
Attorneys.

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